CASES

ARGUED AND DETERMINED

BY THE

SUPREME COURT

OF

The State of Missouri

AT THE

OCTOBER TERM, 1883.

(Continued from Volume 79.)

LEMMON V. HARTSOOK, Appellant.

- Lost Quarter Section Corner. To establish a lost quarter section corner of an interior section, the rule is to ascertain the corners of the section on that side, and a point on the line connecting them and equi-distant from them will be the lost corner. See Coev. Griggs, 79 Mo. 35.
- Division Lines Fixed by Act of Parties: ESTOPPEL. Where one of two adjoining proprietors, for the purpose of enabling the other to locate a division fence, pointed out a line as the true divid-

ing line between them, and the latter, relying upon this information, built the fence and made other improvements up to this line; *Held*, that as against him a grantee of the former proprietor was estopped to deny that this was the true line.

But where the parties agreed upon a line, neither knowing the true line and each intending to fix upon it, and each acting on the best information he could get and not relying wholly on the other;

Held, that there was no estoppel.

- 3. Description of Land: EJECTMENT: PETITION: VERDICT: WRIT OF POSSESSION. A petition in ejectment to recover a strip of land lying on the dividing line between plaintiff and defendant, described the strip as "the south half of the south half of the southwest quarter of the northwest quarter of section 24, township 50, range 21, in Saline county." The verdict was, "We, the jury, find for plaintiff, and designate a line" (describing it) "as the true line between plaintiff and defendant," and the judgment followed the verdict. Held, that the description in the petition was sufficient; that the verdict might have stopped at a finding for the plaintiff, but was not vitiated by the explanatory matter referring to the dividing line; and that a writ of possession based on this verdict and judgment sufficiently informed the officer executing it what land it was his duty to place the plaintiff in possession of.
- 4. Evidence in Ejectment; DECLARATIONS OF GRANTOR OF A PARTY. In ejectment for a strip of land lying on the dividing line between plaintiff and defendant, defendant had offered evidence of acts and declarations of plaintiff's grantor, since deceased, tending to fix the line as claimed by defendant. Plaintiff, in rebuttal, offered evidence of declarations to the contrary made by his grantor while in possession. Held, that this latter evidence was competent.

Appeal from Saline Circuit Court.—Hon. Wm. T. Wood, Judge.

AFFIRMED.

Wallace & Chiles for appellant.

Davis & Willis for respondent.

Ewing, C.—This is a suit in ejectment to recover the south half of the south half of the southwest quarter of the northwest quarter of section 34, township 50, range 21. The petition is in the usual form. The answer is: 1st, A general denial; 2nd, That when the defendant bought and

took possession of this land one Sarah Jeffries was the owner of the land now in controversy, and resided on the same; that she is plaintiff's grantor; that she and her agents pointed out to defendant a line between them as the true line; that defendant then built his fence thereon with her consent; that he has ever since owned and cultivated and claimed his said land to extend to said line; that said Sarah Jeffries agreed that said line should be the true line between them; and that, with her knowledge and without her objection, defendant made valuable improvements thereon; 3rd, That by acts and agreement of said Sarah Jeffries she and her grantees are now estopped from denying this line and claiming any land beyond it.

It was agreed on the trial that the parties claimed title from a common source, one Asa Finley. Plaintiff then introduced N. B. Ross, the county surveyor of Saline county, who testified that he surveyed the land for Albert Sims, and said: "I found no remains or evidence of the northwest corner of section 24, nor any quarter section corner established by the government on the west or east line of the section, nor any center corner to said section 24; most of the government corners on said section were established. I first established a monument at the northwest corner of said section, by running a line from the southwest corner of section 24, where I found a stone corner, said to have been placed there by Duggins, a former surveyor; two miles north to the northwest corner of section 13, where I found a government corner, said to be placed there for the northwest corner of section 13; then I corrected the line back; I then commenced at the northwest corner fractional section 23, where I found a stone said to be a government corner and ran east two miles to the northeast corner of section 24 and found government corner, the stump of a bearing tree, and corrected back; I then located the northwest corner of section 24. I had two methods for locating a lost section corner; one was to have placed it at the intersection of the two lines I thus run; and the other is to

subdivide the north and south line and locate it at the middle point. By which one of these methods I located said corner, I do not know. I then established the quarter section corner on the west line of said section 24 at a point equi-distant from the southwest corner of said section and the northwest corner as established by me in this survey: the quarter section corner thus established is south of Mr. Hartsook's fence that runs between him and Lemmon, but I don't know the distance; in running the east and west and north and south lines to establish the lost section corner to the northwest of section 24, I ran each line the length of two miles, and on these lines I found no government monuments, or those of any other surveyor, and of course was governed by none, only those from where I started and ended the lines; I found a stone by the side of Mr. Hartsook's fence on the west line of section 24, but it was so far out of the way I did not recognize it as a corner; I made several attempts to survey this quarter section, some three times, and placed the corner nearly at the same place each time; my instrument was out of fix, and I sent it off and got another one which I used the last time; I also established a corner at the center of section 24, as shown in my plat, and from this center corner I ran a line west to the quarter section corner established on the west line of said section, and this last line run divides the land of Lemmon and Hartsook."

Plaintiff then introduced Thomas Elliott, a former surveyor of Saline county, whose evidence tended to corroborate that of Ross, and other evidence tending to show that the corner fixed by Ross was the correct one.

Dennis H. Hartsook testified in his own behalf substantially that he bought his land in 1869; that Mrs. Jeffries then lived on the land adjoining him now in controversy; that there was no division fence between them; that in the spring of 1870 he told her he wished to build a fence, and she sent her son to show him the line, which he did, and where he thus built the fence; that he also showed defend-

ant where Alexander established the center of the section; that the corner established by Ross is a considerable distance south of this, and that afterward he planted an orchard and made improvements on the land. Defendant then offered a petition for change of road signed by Mrs. Jeffries and others, and a plat of the survey, as follows:



Defendant introduced Thomas C. Duggins, who testified he was at one time county surveyor of Saline county, and as such had "established the southwest corner of section 13, which is also the northwest corner of section 24, by running a line from the southwest corner of section 24, north to the quarter section corner on the west line of section 13; government corners at both ends of this line being known at that time; corrected back, divided up this line run by me in proper proportions, and set corner to sections 13, 14, 23 and 24.

Plaintiff then offered rebutting evidence, tending to impeach the testimony of the defendant in relation especially to his statement that Mrs. Jeffries' son had shown him the dividing line.

There was conflicting evidence as to the acts of Mrs.

Jeffries and her statements concerning the dividing line, but this was substantially the testimony in the case.

The court then gave instruction number one for the plaintiff, as follows:

Section 24, township 50, range 21, within which the land in dispute is situated, is a section recognized by law as an interior section, and in such sections the legal rule for establishing lost quarter section corners is to establish the same at a point equi-distant from the corresponding corners of the section; and the true location of the southwest corner of the land claimed by plaintiff is at a point half way between the southwest corner and the northwest corner of said section 24; and the true line between the west half of the northwest quarter and the west half of the southwest quarter would be a straight line between said point last mentioned and a point on the east line of said section, equi-distant from or half way between the northeast and southeast corners of said section, provided the quarter section corner on the east line of said section 24, as established by government, is also shown to be lost.

The appellant insists that this instruction ought not to have been given, because it is misleading and erroneous, and there is no evidence upon which to base it. It attempts to lay down the rule by which lost quarter section corners may be established. The evidence at least tends to show that the true location of the southwest corner of the land claimed by plaintiff is at the place specified in the instruction, and the evidence is sufficient upon which to base it; provided it is the true and legal mode for ascertaining the lost quarter section corners.

The land in controversy is in a section recognized by law as an interior section. The laws of the State, (R. S., § 7403,) prescribe the mode of ascertaining lost corners, and it is upon this statute the appellant has attempted to base his fourth instruction, and insists the judgment must be

reversed because of its refusal. But the learned counsel for the appellant seems to have altogether overlooked the fact that the laws of the United States and the regulations thereunder prescribe and fix the manner of establishing lost quarter section corners, both interior and exterior. The 1st section of the act of congress, (3 U. S. Stat. at Large, 566.) amongst other things, provides: "And the corners and contents of half quarter sections shall be ascertained in the manner prescribed by the 2nd section of an act entitled 'an act concerning the mode of surveying, etc.," (2 U. S. Stat. at Large, 313.) " and fractional sections shall, in like manner, be subdivided under such rules and regulations as may be prescribed by the Secretary of the Treasury." These regulations were prescribed, (1 Lester's Land Laws and Regulations, 722,) and provide that "quarter section corners both upon north and south and east and west lines are to be established at a point equi-distant from the corresponding section corners." This rule applies to interior corners. To the exterior corners on the north and west boundaries of township lines a different mode is prescribed. Manual of Surveying Instructions, p. 26. Again, this court, in Knight v. Elliott, 57 Mo. 317, held that "in interior sections, corners are always established, where the original corners cannot be found, at a point equi-distant from the corresponding corners of the section." In that case it was also held that these regulations of the land department, under the statutes of the United States, did not conflict with the statutes of this State, (R. S., 7402,) but if there was a conflict the former are paramount and must govern. In the light of these authorities the fourth instruction asked by appellant, was properly refused. Frazier v. Bryant, 59 Mo. 121.

II. The court, of its own motion, gave the following instruction: "If the jury believe that the line between

plaintiff and defendant was the east and west line in the middle of section 24, that the half mile or quarter section corners on both the west and east lines of section 24 were lost, and that the location of said line between plaintiff and defendant was not known, and further believe that when defendant was about to make his fence dividing the lands of plaintiff and defendant, he, defendant, called on Mrs. Jeffries, plaintiff's grantor, for information as to the location of the true line, and she, or her son by her authority, went with defendant onto the ground and showed and pointed out the line, knowing that defendant was about to erect his fence on said line, and further believe that defendant relying on the information thus given him by Mrs. Jeffries or her son, built his fence, and with the knowledge and acquiescence of Mrs. Jeffries, also, subsequently planted out a hedge fence on or near said line, and also a row of apple trees on the strip in dispute, and after all this some years elapsed before the bringing of this suit, plaintiff is now estopped from asserting any other line as the true line. But if the jury shall believe that neither defendant nor Mrs. Jeffries knew the correct location of the true line and that they both, in error, thought the line on which defendant made his fence was the true line, and both were aiming and intending to fix on the true line, and both, in mistake, acting on the best information respectively they had, or could obtain, defendant not wholly relying on the acts or declarations of Mrs. Jeffries or her son, then, in such case, any improvements made by defendant were made at his own risk, and plaintiff is not estopped from asserting claim to the true line when found or ascertained."

This instruction, and the first given for the defendant and the second and third asked by the defendant and refused, presented substantially the same questions, for the consideration of the jury; and if found to be true by the jury, as alleged by defendant and presented by the instructions, would result in and amount to an estoppel in pais. But the evidence was conflicting; that on the part of the de-

fendant tending to show that Mrs. Jeffries' agent pointed out the line to defendant, that he built his fence thereon and made improvements with her knowledge and consent. The evidence for plaintiff tended to prove that Mrs. Jeffries did not have the line pointed out, but on the contrary, notified the defendant that he was not fencing on his line, etc. These were facts upon which it was the province of the jury to pass; and having found them for the plaintiff, this court cannot interfere. The court below committed no error, therefore, in refusing the defendant's second and third instructions.

III. It is insisted that the petition is defective and does not state facts sufficient to constitute a cause of action; that the judgment on such petition and writ of possession would not inform the officer executing the writ "what land it was his duty to put the plaintiff in possession of." It will be seen that the plaintiff sues for the south half of the south half of the southwest quarter of the northwest quarter of section 24, township 50, range 21, in Saline county. The judgment was "that plaintiff recover of defendant the possession of the land in the petition described, to-wit"-and describing the land in the judgment. The judgment then goes on-"and that execution issue to restore the possession of said land or so much thereof, not further south than the boundary line in said verdict described, as said defendant shall be found in possession of at the time of the exeeution of said writ." The verdict of the jury was as follows: "We, the jury, find for the plaintiff, and designate a line beginning at a point equi-distant between the southwest and northwest corners of section 24, and running east on the line as surveyed and located by Mr. Ross to the corner established by Mr. Ross, as the true line between plaintiff and defendant, and assess no damage or rental against defendant." This judgment and verdict are more specific than necessary. The judgment might have stopped

when it decreed that plaintiff recover the land sued for in the petition, describing it. The verdict would have been sufficient when finding for the plaintiff. The other parts of the verdict and judgment are simply explanatory, and do not change the rights of the parties. In Livingston Co. v. Morris, 71 Mo. 603, cited by appellant, the description of the land was so vague it could not be identified: "All that part of the east half of the northwest quarter of the southwest quarter section 20, township 57, range 24, containing sixteen acres, more or less," is unintelligible. It could not be identified. Tyler on Eject., pp. 580, 582. The verdict here was for all the land claimed by the plaintiff, but the jury goes further than necessary and describes the dividing line. It does not vitiate the verdict. Clay v. White, 1 Munf. 162.

IV. The court did not err in admitting the statement of Mrs. Jeffries in evidence. She was the owner and in possession of the land at the time the declarations were made and has since deceased. 1 Greenleaf Ev., § 109, and authorities cited in note b; also Hunnicutt v. Peyton, 102 U. S. 333; Darrett v. Donnelly, 39 Mo. 493; State to use, etc., v. Schneider, 35 Mo. 533; Burgert v. Borchert, 59 Mo. 80. See note to Deming v. Carrington, 30 Am. Dec. 595; s. c., 12 Conn. 1.

In the state of Massachusetts where this subject has been much discussed, it is held that to be admissible such declarations must be made by persons in the possession of land, and in the act of pointing out their boundaries. Bartlett v. Emerson, 7 Gray 174; Daggett v. Shaw, 5 Metc. 223; Long v. Colton, 116 Mass. 414. The declaration derives its force from the fact that it accompanies and qualifies an act and is thus a part of the act. Bender v. Pitzer, 27 Pa. St. 333. The weight of authority seems to be that in questions of private boundary declarations of particular facts as distinguished from reputation, are admissible in evidence

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when made by persons in possession of the land when the declarations are made, or who are on the land at the time, and are shown to have knowledge of that whereof they speak. 102 U. S. 333. Under these rulings we hold the declarations of Mrs. Jeffries admissible in this case. The declarations objected to were as follows: Mrs. Jeffries "told witness that Hartsook was building his fence on her land; said she had repeatedly told him;" and also "that Mrs. Jeffries said she had her land surveyed and knew Hartsook was over the line." This was brought out in plaintiff's rebutting evidence.

The judgment of the court below is affirmed, all concurring.

Mowrer, Appellant, v. Helferstine.

Excessive Tax: REPLEVIN. Replevin will not lie against the collector of taxes to recover personal property seized to satisfy a tax levied by the proper officer; and it does not matter that the levy is excessive, and that fact is apparent on the face of the tax-book.

Appeal from Putnam Circuit Court.—Hon. Andrew Ellison, Judge.

AFFIRMED.

Shelton, Hoskinson & Mullins for appellant.

Smith & Krauthoff with H. D. Marshall for respondent.

Henry, J.—The county court of Putnam county, for the year 1878, levied taxes as follows: County revenue fund thirty cents, county bridge fund twenty cents, county poor fund five cents, county road fund thirty cents, and county railroad fund thirty cents on the \$100, and the tax books for that year showed that plaintiff's property was Mowrer v. Helferstine.

taxed, in addition to State taxes, in accordance with the order of the court making the above levy, and that said several taxes were set out in separate columns, headed respectively, county tax, railroad tax, school tax, road tax, bridge tax, poor tax. Plaintiff paid all of said taxes except the bridge and poor tax, for which defendant, collector of the county, seized a horse colt, the property of plaintiff, who instituted this suit to recover possession of the colt.

For plaintiff the court gave the following instructions:

1. The levy of taxes for county purposes is and has been, ever since November 30th, 1875, limited to fifty cents on the \$100 valuation, and such levy for county purposes includes the opening and improving of public roads, the support of the poor and the building of bridges, and the levy by the county court in 1878, of thirty cents for county tax and thirty cents for road tax on the \$100 valuation, exceeds said limit ten cents on the \$100, and the additional levy by said court in 1878, of five cents for poor tax and twenty, cents for bridge tax on the \$100 valuation, and placed in separate columns on the tax book for 1878, is unauthorized by law and void on the face of said tax book.

2. The levy made by the county court of a tax of five cents on the \$100 as a poor tax and twenty cents on the \$100 as a bridge tax, was and is unauthorized by law and void; and said taxes appearing in columns in the tax book separate and distinct from the column in said tax book setting forth the county revenue tax, and said last named tax and the road tax in another column, showing a levy of sixty cents on the \$100 valuation—said bridge and poor tax appear on said tax book to be unauthorized by law.

3. The court declares the law to be that the "poor tax" and "bridge tax" are, under the statute, included in and a part of the county revenue tax.

4. The levy made by the county court of Putnam

county of the taxes for the year 1878, for county purposes, was and is in excess of the amount authorized by law.

The court refused the following asked by plaintiff:

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5. Although the facts in this case show that the property in question was seized and taken away from plaintiff by defendant as collector for and on account of certain unpaid taxes; yet if it further appear that said unpaid taxes were and are illegal and unauthorized by law as declared in the foregoing declarations of law, then said tax book and the fact that said illegal taxes were unpaid, did not justify defendant in seizing and taking from plaintiff said property, and the finding should be for the plaintiff.

6. Under the undisputed evidence in this case the

plaintiff is entitled to recover.

The court, on its own motion, declared the law as follows:

The court declares the law that if the evidence shows the property in question was seized by the collector for taxes due upon the tax books in his possession, then the said property was taken on process of law against the plaintiff herein, and the finding must be for the defendant.

To the giving of said declaration of law the plaintiff

objected and duly excepted.

The court found for the defendant, and rendered judgment in his favor, from which this appeal is prosecuted, and the question is the same as was distinctly presented and

expressly decided in Ruby v. Shane, 54 Mo. 207.

Appellant's counsel contends that Henry v. Bell, 75 Mo. 194, is in conflict with Ruby v. Shane. On a careful examination of that case, however, it will be found that a different question from that presented by this record was there passed upon by this court. It appeared that the special tax in question there, was not extended upon the original tax books delivered to the collector of Mt. Pleasant township, but was added by the county clerk in pursuance of an order of the township board. By the act then in force, the tax in question could only be extended by the clerk of the county court, under the supervision of the county court, section 6 of the Township Organization Act providing that "the money necessary to defray the township charges of

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each township shall be levied on the taxable property in such township, in the manner provided by the act for raising revenue and other moneys, for State and county purposes and expenses." The following language of the court shows clearly the grounds upon which it held that the plaintiff could recover, in a suit against the collector, the property levied upon by him to satisfy the taxes so extended by the clerk: "Where, in these sections, or elsewhere, the county clerk derived his authority to extend the special tax in question on Mt. Pleasant township tax books, we He had no have not been able to discover. authority to do so, and this is not the case of an irregularity in the levy of a legal tax, but a levy made by one who has not the semblance of authority to do so, and such a levy, so made, affords no defense to a collector for a seizure of property under it."

In Ranney v. Bader, 67 Mo. 476, the doctrine announced in Ruby v. Shane was explicitly recognized in the following language: "In the case of Ruby v. Shane, which we think decisive of the second point we are considering, it was held that when the property was liable to taxation, and the assessor's book, superintended and sanctioned by the county court, ordered the collection of the tax, the collector would be exonerated from liability, and that when the assessment is illegal, or based on the illegal act of the county court, the remedy of the tax-payer must be by a proceeding to arrest the execution of the illegal assessment and collection of the There is great force in the following observations of Judge Napton, in the opinion delivered by him in Ruby r. Shane: "To hold a subordinate ministerial officer responsible for the erroneous opinions and judgments of the judicial tribunal under whose mandate he acts, is not consistent with our views of justice, public policy or expediency. Preventive remedies should be favored, but punitive judgments against innocent parties should not be encouraged.

* * It is true that no redress has been indicated where the illegal tax has been paid, but would it not be

more in accordance with justice and the principles of law, that several hundred or several thousand people, not one of whom ventured to ask the interposition of a court before the collector came around, should suffer the loss of an inconsiderable sum, than that the officer to whom is entrusted the collection of the revenue should be compelled to refund to the hundreds or thousands from whom he has collected a tax, the aggregate sum collected on an illegal assessment?" The remedy of the tax-payer against illegal assessments and levies, is clearly indicated in Rubey v. Shane and Ranney v. Bader, and he has no occasion to wait "until the tax-collector comes around," but may institute his proceeding to enjoin the collection of the tax, even before the tax-books are delivered into the hands of the collector.

The judgment of the circuit court is affirmed. All concur, except Sherwood, J.

FENIX et al., Appellants, v. FENIX'S ADMINISTRATOR.

Administration: ORDER OF SALE OF REAL ESTATE, IMPEACHMENT OF.
An order of sale of real estate is not such a final order as will conclude the heirs of the decedent from showing, upon the incoming of the report of sale, that there are no debts, or that there are personal assets sufficient to pay all debts, or any other fact tending to show that the order ought not to have been made.

Appeal from Dallas Circuit Court.—Hon. R. W. FYAN, Judge.

REVERSED.

A. S. Smith and F. P. Wright for appellants.

Smith & Krauthoff with Nixon & Wallace for respondent.

Martin, C.—The issues in this case arise upon a motion by the widow and heirs of a decedent to set aside an order

of sale of real estate and disapprove a report of sale made by the administrator. The motion was filed in the probate court on the 12th day of February, 1879. It appears from the evidence that William L. Fenix died in 1871, leaving the real estate in controversy, and that the complainants are his children and widow. On the 1st day of September, 1871, his estate was taken in charge by Jeremiah W. Cheek, as public administrator of Dallas county, but full administration was not effected by him. James L. Southard succeeded him as administrator de bonis non, and as such is the party defending the motion of the widow and heirs.

On the 17th day of May, 1878, the administrator filed his application in the probate court, alleging a deficiency of personal assets to pay the debts, and asking for an order of the court authorizing him to sell the real estate now in dispute. On the same day the court made an order of publication of notice to all interested, in the usual form. notice was published the requisite length of time. proof of such publication the court made its order for sale of the real estate. This order was made on the 12th day of August, 1878, and after reciting publication of the notice, goes on to say: "And it being proved to the court that there is not sufficient personal estate and effects of said deceased charged with payment of debts, and not sufficient assets in the hands of said administrator to pay the debts due by said estate, it is ordered that the said James L. Southard, as such administrator, do, on the 11th day of November next" sell at the place and in the manner therein stated the said real estate. On the 11th day of February, 1879, the administrator filed a report of his sale under the order, in which he says, that he made sale of the land on the 11th day of November, 1878, to different persons for the aggregate sum of \$1.114.50. On the 12th day of February, 1879, and before any action was taken on the report, the complainants herein appeared in court and according to the entry then made filed their "motion to set aside said sale of land and order for said sale, with all other proceedings

therein." This motion is in writing, and besides irregularities in the petition, order, proof of notice and other matters of form suggested therein, proceeds to set out facts tending to show that the order of sale was erroneously granted. It alleges that the former administrator received sufficient personal assets to pay all the debts due by the deceased, and that he squandered the same; and that the debts referred to in the application for the order of sale were in truth paid off by the former administrator, and that the allowances of said debts were procured by collusion between said former administrator and the parties claiming the same. It is also alleged in general terms that the present administrator is seeking and designing to defraud the complainants, and that the lands which he sold for \$1,146.50 are worth \$7,000.

To this motion the administrator filed an answer in writing denying everything. According to the record the parties appeared in person and by attorney, "and matters of evidence being heard, the court finds the issues for James L. Southard, administrator de bonis non of the estate of Wm. L. Fenix, deceased, and orders approval of sale of lands." An appeal was taken by complainants to the circuit court where, after a continuance in behalf of the administrator, the motion came on to be heard.

To sustain the issues on their part the complainants offered to prove, by the records and files relating to the administration of the estate, that the former administrator had received personal assets to the amount of \$8,000, and that there were only \$2,100 of debts due by the estate. They also offered to prove that the former administrator had embezzled and converted to his own use a large amount of the personal assets of the estate; and that but for said embezzlement there would have been abundance of assets to satisfy all the debts. They also offered to prove that the debts, for payment of which the sale had been ordered, had been paid off before application for the order. It was admitted by Mr. Southard that he was one of the bondsmen

of the former administrator when he took charge of the estate. To all the evidence contained in these offers the administrator objected, on the ground that the complainants could not go behind the order of sale; that when notice was given to all parties interested in said land to appear and show cause why an order of sale of the land should not be made, and they failed to appear and show cause, they lost their day in court. It is argued that they should have appealed from the order of sale. The court sustained the objection of the administrator and excluded the evidence, and found the issues in favor of the defendant and approved the sale. From this action of the court the complainants bring their appeal.

The only question presented for decision in this statement is, whether parties interested in land ordered by the probate court to be sold, will be permitted to impeach the order after lapse of the term at which it was made, but before approval of the sale, by submitting evidence tending to prove that the facts which authorized the court in making the order are untrue. After considering this question carefully I have reached the conclusion that the action of the court must have been induced by a possible misconception of the nature of the order made by it, and the nature and scope of the proceedings in which it was made.

An administration of the estate of a deceased person, as conducted by the probate court under the laws of this State, is in the nature of a proceeding in rem—a single proceeding. It opens by the appointment of an officer of the court who takes charge of the assets of the estate and makes public proclamation of the fact to the end that all persons having claims against the estate may come forward and assert them against the property in his charge. It terminates by the final discharge of this officer, after another publication of notice to that effect, by which all persons in any way interested in the estate may come forward and object to the transactions of the administration which is about to close. These notices constitute the process to the

world upon which rest the conclusive and binding effect of the proceeding. Originally this proceeding concerned only the personal estate of the decedent, while the realty vested immediately in the heirs and devisees. The realty still vests in the same way, but subject to be called upon by the administrator in the event of a deficiency of personal assets. To the extent of this recourse upon it the realty has been added to the available assets of the estate.

The conditions upon which resort to the realty is authorized, as well as the method to be pursued in doing it, are particularly set out in the statute of administration. It will be found on examination that this method constitutes a special proceeding by itself springing out of the necessity of more assets than are furnished by the personal estate. and is subordinate to the chief purpose of the administration proceeding of which it forms an inherent part; and in determining its scope and bearing this feature ought not to be lost sight of. This special proceeding consists of certain things required to be done which constitute necessary and consecutive steps all leading to the same result, and which are known as the petition, order of publication, proof of publication, order of sale, act of sale, report of sale and approval of sale. It is the order approving the sale which terminates the proceeding and vests the title of the land in the purchaser, and the title of the purchase money in the administrator for the purpose of paying the debts of the This proceeding is but one thing as a whole, commencing with the petition and ending with the order of approval of sale. The order of sale is a necessary, but only an intermediate step in the proceeding. If there is no order there can be no sale, and consequently nothing for an order of approval to rest upon. While the order of sale is a necessary link in the proceeding, it is by no means the final one, and standing by itself it effects nothing. The proceeding must go on to a sale and to an approval of sale to give any efficacy to the order of sale.

When, therefore, a party interested in the land appears

in court after sale of the land and before the court has made judgment of approval, and objects to the approval of sale and to the order of sale, he is only objecting to an intermediate step in a pending and unfinished proceeding to which he has been made a party only by constructive notice. He ought not to be met with the statement that he is concluded by the order of sale from going back of its date, when the order itself is not a final and concluding judgment in the proceeding. That an order of sale before order of approval is neither final or conclusive, is apparent from the language of the statute, which declares that "if such report and proceedings of the executor or administrator be not approved by the court, his proceedings shall be void, and the court may order a new sale, upon which the same proceedings shall be had as upon the original." R. S. 1879, § 168. Thus it seems that a refusal to approve the report avoids the order of sale itself.

Now it seems to me that the conclusion is irresistable that when the time comes to approve the sale, which act of the court gives to the whole proceeding its validity and . effect, the court has the right to review the whole proceeding about to terminate before it, and refuse to give to it the effect of a judicial sanction for any good and sufficient reason; although that reason may reach back to impeach the order of sale itself. Not only has the court this right, but it is in the nature of a duty which cannot be escaped by pretending that it is concluded by its own order which constitutes only an intermediate step in the proceeding pending before it. Under our decisions, if there are sufficient personal assets in the hands of the administrator to pay the debts, the court has no authority to order a sale of the realty. If the assets have been wasted by the administrator, then the creditors must, in the first instance, look to the bond of the administrator for a satisfaction of their demands before they can ask for a sale of the realty. Merritt v. Merritt, 62 Mo. 150. A resort to the bond of the administrator is only a part of their obligation to exhaust

If the debts have been paid or have no existence except by virtue of erroneous or fraudulent allowances, the order for sale of the realty ought not to be made, and if made ought to be vacated and set aside. Now while it is true these heirs were, in a legal sense, informed of the application for the order of sale, yet it was only by a constructive notice published in some newspaper. When the order was made they were not actually but only constructively present. It is the practice of courts conducting such proceedings as these to ascertain the reasonable objections of all parties interested in their result, provided they appear before the proceedings are finally closed. The manifest justice of this practice can be easily guarded by the court against any possible inconvenience and abuse.

In the case of Henry v. McKerlie, 78 Mo. 416, we had occasion to examine at some length the conclusive effect of proceedings for the sale of real estate by administrators, when they had culminated in a final judgment of approval, and we found that they are now regarded as binding on all parties interested in them, and cannot be attacked in collateral proceedings for mere irregularities any more than the judgments in other courts and proceedings. thorities in support of this principle need not be cited in support of the action of the lower court in refusing to hear the appellants in their attack on the order of sale. were interested in the land. They appeared and made their attack in the proceedings as they were conducted before the court and before these proceedings had culminated in a final judgment binding on them or any one else.

Under these views of the case it becomes necessary to reverse the judgment and remand the cause for trial. All concurring, it is so ordered.

Holland et al., Appellants, v. Johnson.

Equity; void deed no cloud on title: change of venue. In an action against several defendants, originating in Hickory county, some of the defendants applied for a change of venue, and the court ordered a change, as to them, to Pettis county. The court in Pettis county afterward rendered judgment against one of the defendants who had not joined in the application for the change, and who never appeared to the action and was served only by publication; and his land was sold to satisfy the judgment. In a suit brought by this party to set aside the sheriff's deed, these facts, among others, appearing in the petition; Held, that the petition was bad on demurrer; that the court in Pettis county obtained no jurisdiction of this party; that the judgment was, therefore, a nullity as against him, and the deed was void, and so there was nothing upon which a court of equity could act.

Sherwood, J., agreed that no title passed by the sheriff's deed, but held that it was a cloud upon the plaintiff's title, which ought

to be removed by a suitable decree.

Appeal from Hickory Circuit Court.—Hon. R. W. FYAN, Judge.

AFFIRMED.

A. S. Smith and F. P. Wright for appellants.

Smith & Krauthoff with Nixon & Wallace for respondent.

Ewing, C.—Plaintiffs filed their petition in the circuit court of Hickory county, November, 1875, against the respondent to have a certain deed set aside for fraud. Defendant demurred to the petition, which was sustained, and the case is here on appeal as to the sufficiency of the petition.

The petition alleges that in April, 1866, the plaintiff, Henry W. Holland, sold and conveyed to Thomas Holland certain land in Hickory county, (describing it,) which is the land in controversy; that a deed from one Quigg, sheriff of Hickory county, to the defendant, Marshall W. Johnson, conveying the land in controversy, is on file in

Hickory county, which deed recites that on July 22nd, 1864, a writ of attachment issued from the circuit court of Hickory county in favor of said Johnson and others and against Henry W. Holland and Alexander Foster, which was levied on the land in dispute as the property of Henry W. Holland; that on July 31st, 1867, a judgment was rendered in the circuit court of Pettis county in favor of respondent Johnson and others and against Henry W. Holland and others for \$30,000, and costs, and the said lands ordered sold; that on February 28th, 1868, said lands were sold to defendant Johnson for \$604.

The petition in this case then alleges that in this attachment proceeding the only notice had by Henry W. Holland was by publication; that the petition in the attachment suit alleged that Henry W. Holland and others had committed a trespass by taking goods, etc., of the value of \$30,000; that a part of the defendants in that proceeding were served with a summons and Henry W. Holland and others only by attachment and publication; that the said sheriff and the plaintiffs in said suit failed at any time to "file a notice of said suit or abstract of the lands so attached;" that the notice by publication failed to state the amount claimed as damages for the alleged trespass; that at the September term, 1864, of said circuit court of Hickory county a part of the defendants in said suit, to-wit: Charles A. Pippin, John F. Stark, John Huffman, Jesse Huffman, Wallace Drumon and George W. Rains, appeared and answered, and at the same term a judgment by default was rendered against Benj. H. Massey, another of said defendants; that at the September term, 1865, of said court, John F. Stark, John Huffman and Wallace Drumon filed a petition for a change of venue, but that said petition was irregular in that it failed to state that "the facts upon which it was based had come to the knowledge of said defendants after the filing of their answer," as required by law, also irregular in that it alleged that "one of the said plaintiffs had such an influence over the seventh and fourteenth

judicial circuits and over that portion of the first circuit south of the Osage, that a fair trial could not be had," etc.; and failed to allege "the defendants had an undue influence over the minds of the inhabitants of Hickory county where the suit was pending;" that the affidavit to said petition for a change of venue was sworn to by only one of said defendants; that afterward, at the September term, 1865, of said court, upon the petition of the parties named, "a minority of the defendants in said cause, and while the aforenamed interlocutory judgment against said Massey was standing, and while the answer of a part of the defendants was on file, and without the knowledge, appearance or consent of Henry W. Holland and Alexander Foster, or any other of said defendants, save those named in the petition for a change of venue, the court ordered a change of venue to the circuit court of Pettis county, as to the parties which had made the aforenamed application therefor;" that a transcript was filed in Pettis county, and on November 2nd, 1865, said court gave plaintiffs leave to file an amended petition; that on the 6th day of January, 1866, plaintiffs filed their amended petition against all of the defendants, and a bill of items upon which it was based: that in the amended petition plaintiffs alleged and claimed damages to the amount of \$135,000, whereas the original petition alleged and claimed damages for \$30,000, and that said amended petition set forth, named and claimed damages for the taking of goods and property which had not been named in the original petition; that when the amended petition was filed the plaintiffs caused a notice to B. H. Massey and Henry W. Holland to be made, that they had filed an amended petition, upon which the sheriff of Hickory county certified that said Massey and Holland could not be found in Hickory county, and the sheriff of Pettis county returned that he served the defendants therein by "posting up a true copy of the same on the door of the office of the clerk of the circuit court of Pettis county, Missouri, on the 13th day of December, 1866;" that that

was the only notice issued to Holland of the filing of the amended petition, and that there was no appearance thereto by Massey or Holland or Foster; that afterward, in April, 1866, John Stark, John Huffman, Jesse Huffman, Wallace Drumon and George W. Rains, filed their answer to the amended petition; that on the 31st day of July, 1867, the Pettis circuit court rendered judgment against John and Jesse Huffman for costs, "and upon motion of plaintiffs dismissed said cause as to them and all other defendants save Henry W. Holland, Alex. Foster, William F. Hicks and Benj. H. Massey, and then rendered judgment against said Henry W. Holland, Foster, Hicks and Massey for \$30,000; that said judgment did not recite notice to either of said defendants, but only that they had been three times solemnly called; that said judgment ordered a special execution against the lands of Holland and a general judgment against Holland and the other defendants; that there never was any service of notice on Henry W. Holland, except the notice by publication aforesaid; that there was no notice to or service on Foster, and that he was dead before the suit commenced, nor on Massey, and that he was dead before the amended petition was filed, and no appearance by Henry W. Holland, or Hicks, or Foster or Massey; that the petition in the attachment proceeding alleged that in October, 1861, Henry W. Holland and others unlawfully, wrongfully and maliciously, took, carried away and converted to their own use goods, etc., of the value of \$30,000, whereas it was not true; and that said allegations were false and fraudulent as to said Holland, and made for the purpose of defrauding and cheating said Holland; that said sale was made on judgment for costs rendered against other defendants than Henry W. Holland and Foster, and not against them.

The only question is as to the sufficiency of the petition. The defendant demurred to the petition because it does not state facts sufficient to constitute a cause of action, and of course thereby admits its allegations to be true.

The purpose of this proceeding is to set aside a sheriff's deed for fraud on the plaintiff Henry W. Holland, and it is alleged that such deed is based upon a sale under a judgment in a suit by attachment commenced in Hickory county, thence taken to Pettis county, where judgment was rendered and the attached land ordered sold. The attachment suit was by Johnson, the defendant here, and others, against Henry W. Holland and others, and at the sale Johnson became the purchaser. It is alleged in the petition, and admitted by the demurrer thereto, that "John F. Stark, John Huffman, Jesse Huffman and Wallace Drumon, part of the defendants in said cause," to-wit, in the attachment suit, "filed a petition for a change of venue from Hickory county circuit court; that at the September term of said court, upon said petition of a portion and minority of said defendants, and without the knowledge or consent or appearance of Henry W. Holland, Alex. Foster or any other of said defendants, save those named in the petition for a change of venue, the court ordered a change of venue to the circuit court of Pettis county, as to the parties which had made the aforenamed application therefor." If these allegations be true, which are admitted by the demurrer, then the circuit court of Pettis county only had jurisdiction of those defendants who applied for the change of venue, and who alone were included in the order. Holland then was not in court. The venue of the case was not changed as to him. The Pettis court could have no jurisdiction over him, except as acquired by the change of venue; and the order changing the venue was "as to the parties which made the aforenamed application therefor;" and Holland was not one of them. As to the parties not included in the change of venue the case remained in Hickory county, and the judgment of the Pettis court as to Holland and the others not so before it was a nullity. The sale under such judgment is void, and hence Johnson's deed from the sheriff passed no title and is worthless. Hence the petition states too much. It shows the deed sought to

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be set aside is void, which leaves nothing for a court of equity to do, and shows the plaintiff has a complete and adequate remedy at law. Janney v. Spedden, 38 Mo. 396; Odle v. Odle, 73 Mo. 289. This conclusion settles the case, and it is not necessary to further examine the questions presented.

The judgment of the circuit court should be affirmed. Philips, C. concurring; Martin, C., absent.

So ordered, Sherwood, J., dissenting.

Sherwood, J.—I agree that the defendant acquired no title, but think that under the ruling in *Harrington v. Utterback*, 57 Mo. 519, and cases cited, the judgment should be reversed and the cloud removed from plaintiff's title by suitable decree.

GRAYSON et al., Plaintiffs in Error, v. WEDDLE.

- Administrator's Sale: ERROR IN DEED: EQUITY FOR TITLE. Where
 a purchaser of land at administrator's sale pays the purchase money,
 and the same is applied in discharge of the debts of the decedent,
 but the land is not correctly described in the administrator's deed,
 an assignee of the purchaser will be entitled to a decree in equity
 correcting the error and divesting the legal title to the land out of
 the heirs of the decedent and vesting it in him.
- 2. Jury Trial. Where an answer in ejectment combined a legal with an equitable defense, Held, that it was error to refuse a jury trial upon the issues at law. But where the parties after such refusal submitted the case for trial to a counselor of the court, stipulating that his finding should be entered as the finding of the court; Held, that this waived the right to have a jury.
- 3. Justices of the Peace. A justice of the peace has no authority to do an official act beyond the limits of his own county. An application for a change of venue sworn to before a justice outside of his county is, therefore, not verified by affidavit.

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Error to DeKalb Circuit Court.—Hon. J. P. Grubb, Judge.

Affirmed.

S. G. Loring for plaintiffs in error.

H. K. White and Strong & Mosman for defendant in error.

Henry, J.—This is an action of ejectment commenced by plaintiff in the DeKalb circuit court, for the east half of the southeast quarter of section 27, the northeast quarter and east half of the southeast quarter, and the northwest quarter of section 34, all in township 58, in DeKalb county.

The answer, in addition to a general denial, set up an equitable defense: in substance, that the probate court of said county made an order for the sale of said land for payment of debts of the estate of Joseph Morgan, who died seized of the land, and under whom, as his heirs at law, plaintiffs claim title; that at the sale so ordered, one Moore purchased the land, at the price of \$3,700, its appraised value, and paid the purchase money; that the report of sale was approved by the probate court; that the administrator failed to make a deed to Moore, who sold the land to defendant Weddle, receiving a part of the purchase money, and delivering his bond for a title, on the payment of the balance; that after Moore's death, Weddle paid the balance, and instituted a suit against Moore's heirs to obtain a decree for title, in which a decree was rendered, vesting in him their title; that afterward, under a mortgage foreclosure, as to part of the land, and a purchase of the balance, defendant Ransom acquired title to all the land from Weddle, and is in possession; that after Moore's death, the administrator of Morgan's estate, who made the sale as such, executed a deed, as administrator, conveying the land sold by him under the order of the probate court, to

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Moore's heirs, except the east half of the southeast quarter of section 34, township 58, range 32, in lieu of which another tract was, by mistake, embraced in the deed, in which it was the intention to embrace said east half of the southeast quarter above described. It is also alleged that said administrator expended the purchase money received from Moore in payment of debts of said estate, and supporting and maintaining plaintiffs; that defendants and Moore and his heirs have made lasting improvements upon the land; and the prayer is that the court will, if it find against defendants that plaintiffs had the legal title, re-imburse them for purchase money, improvements, etc., or render a decree vesting the legal title in them, and for general relief.

The plaintiffs moved the court to strike out those parts of the answer alleging mistake in the deed made by the administrator, and that the purchase money received from Moore had been used in payment of debts of the estate and in support and maintenance of plaintiffs, and, also, the prayer of the answer. The court overruled the motion.

This cause was once before in this court, on error, and is reported in 63 Mo. 521, and it was then expressly ruled that defendants might amend their answer, with respect to the mistake in the deed from the administrator; and with regard to the other parts of the answer embraced in the motion, they were, in our view of the case, wholly immaterial, except the prayer of the answer, to which we see no objection. Nearly every question argued by appellants' counsel, in his brief, was passed upon, and decided adversely to appellant, when the cause was here before, and we shall, therefore, notice only such portions as were not then considered.

The amendment with respect to the mistake made in the administrator's deed having been expressly sanctioned 1. ADMINISTRATOR'S in the opinion of the court in this case deequity to title. livered on the former occasion, was an intimation that if the facts as alleged in the answer were found for defendants, this would constitute an equitable

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defense to the action so far as concerned that omitted tract. If Moore bought and paid for that tract, the defendants, under their purchase from him, and by the decree in the suit of Weddle against his heirs, stands in his place; and upon the principle recognized by the recent decisions by this court, that the purchaser at an administrator's sale, under such circumstances as are alleged in this answer, acquired an equitable if not a legal title, which will enable him to defend against an action of ejectment brought by the heirs at law of the intestate, no good reason is perceived why it is not also a sufficient ground for a decree vesting the legal title in the equitable owner. Snider v. Coleman, 72 Mo. 568. If, as against the heirs, who have the legal title, such purchaser is entitled to the land, and can forever hold it against them, their legal title is a cloud upon his superior title, and equity should remove it. This doctrine harmonizes with the principle of the recent decisions of this court, and with elementary principles of equity jurisprudence.

At the trial plaintiffs demanded a jury, which was refused; and therein the court committed error. The answer 2. Jury trial. of defendants combined a legal with an equitable defense, and the whole case was not one of equitable cognizance. In Freeman v. Wilkerson, 50 Mo. 554, cited by respondents' counsel, the only defense was equitable. The general denial in the answer of the facts alleged in the petition, raised an issue at law, and this issue was triable by jury.

It is insisted that the court also erred in refusing the change of venue applied for by plaintiffs. Both in form and substance, the petition complied with the law. The affidavit attached to the petition required by the law was made in DeKalb county, before a justice of the peace of Clinton county. A justice of the peace has no authority to act, as such, beyond his county. His act as a justice of the peace, done in DeKalb

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county, was a nullity, and the petition was, therefore, not verified by affidavit.

For refusing to call a jury to try the issues made on the legal defense, the judgment must be reversed and the cause remanded

On Motion for Rehearing.

HENRY, J.—The judgment heretofore rendered in this cause, to-wit, on December 3rd, 1883, at the present term of this court, by which the judgment of the circuit court was reversed and the cause remanded, is hereby set aside and a judgment of affirmance will be rendered and is hereby ordered. The sole ground upon which the reversal was based was that the court erred in refusing plaintiffs' request that a jury should be called to try the issues of fact. No abstract of the record was filed by defendants' counsel, and from that filed by plaintiffs in error the following order was omitted, although contained in the transcript, at page 31: "Now at this day come the parties hereto by their respective attorneys, and by agreement of said parties in open court, it is ordered that this cause be submitted to the Hon. Wm. Henry for trial, his finding herein to be made the finding of the court, subject to all exceptions to the same extent as if tried by the judge of this court." The cause was tried by Wm. Henry, and we would not have reversed the judgment had we known of the existence of that order, and we would have discovered it, but for our confidence that no member of the bar of this court would omit from his abstract so important a part of the record and then insist upon a point which he must have known that such omitted part would have fully answered. All the judges concur, except Norton, J., absent.

Smiley v. Smiley.

SMILEY et al., Appellants, v. SMILEY.

Administration: FINAL SETTLEMENT SET ASIDE FOR FRAUD. If an administrator fails to account for interest collected on loans of money of the estate, and conceals from the court and the heirs the fact that he has collected such interest, the latter will be entitled to have his final settlement set aside and an account taken.

Appeal from Pettis Circuit Court.—Hon. Wm. T. Wood, Judge.

REVERSED.

Thos. P. Hoy and Geo. P. B. Jackson for appellants.

F. P. Wright and Snoddg & Short for respondents.

Ewing, C.—This suit was instituted by the heirs of Henry Walker Smiley, the appellants, against George W. Smiley and the securities on his bond as administrator of Hy. W. Smiley. Afterward George W. Smiley died, and the suit was revived against his executors. One of the securities, Hunter, was not served with process, and the case was dismissed as to him. The other security, Beaman, was one of the judges of the probate court which approved the settlement of Smiley and discharged him and his securities. On the trial Beaman withdrew his answer, and no defense was made by him. The object of the suit was to set aside the final settlement of Geo. W. Smiley for fraud, and praying for a true accounting of the assets of the estate. answer denies any fraud in the final settlement; denies that there were any fraudulent representations or suppression of truth concerning the settlement; denies that Smiley received the sums as alleged. There was a judgment for the defendants, from which appellants have appealed, and ask a reversal upon the ground that the finding of the circuit court is against both the law and the evidence.

The controlling question in this case is as to interest which plaintiffs allege the administrator collected and failed Smiley v. Smiley.

to charge himself with; and it will be to this point that attention is directed.

The inventory read in evidence shows 234 acres of land, and then, "personal property, goods and chattels as follows:" which consist of cash on hand and notes amounting to \$2,235.30. Then comes the list and appraisement of personal property not included in the inventory, amounting to \$967.50. These were made June 7th, 1864. July 3rd, 1865, the administrator files his first settlement, which states "This accountant charges himself as follows: inventory of real and personal, total appraisement \$2,235.30. Total appraisement \$967.50. Making \$3,211.80."

But this evidently does not include the real estate. It is the amount of the cash and the notes and the appraisement of personal property. This settlement shows credits amounting to \$101.38, leaving balance due the estate of \$3,110.42. The second annual settlement, August, 1866, charges the administrator with \$3,110.42; with credits of \$88.50; leaving a balance of \$3,021.92.

May 3rd, 1869, three years after the last settlement, the final settlement is filed, in which he is charged with the \$3,021.92 and "interest on \$1,800," \$297; making \$3,318.92; with credits of \$1,063.90; leaving balance due estate \$2,255.02.

Taking this showing so far, it would seem that the administrator had cash and interest-bearing notes from the date of the inventory, June 7th, 1864, to May 3rd, 1869, amounting to \$2,235.

It appears from two mortgages given by Wm. B. Porter to Geo. W. Smiley, and from Porter's deposition that he, Porter, borrowed from Smiley May 11th, 1864, \$1,300, and January 6th, 1865, \$695.40, and that Smiley said he held this money as administrator of Hy. W. Smiley, and that he paid compound interest on it. Smiley's receipts show that the mortgages were satisfied April 15th, 1868. There is other evidence showing pretty conclusively that this administrator had loaned money to other parties, and

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that the rate of interest was ten per cent per annum. There is nothing in the record showing any reason why the administration of this estate should be prolonged from June, 1864, to May, 1869.

The most of the property seems to have been real estate, cash and interest-bearing notes and requiring no long time to settle it up. But however this may be, if an administrator collects interest from money of the estate in his hands, it is certainly assets belonging to the heirs, for which he is bound to account. I think the evidence clearly shows that Geo. W. Smiley mingled the money of the estate with his own and loaned it out, taking notes in his own name drawing ten per cent interest, compounded; that he failed to account in his settlements for all the interest he received, which of right belonged to the estate; that he concealed this fact from the court and from the heirs; that such omission to include it in his settlements and concealment worked a wrong to the heirs, which constitutes such a fraud as will justify setting aside the final settlement. Clyce v. Anderson, 49 Mo. 37; Merritt v. Merritt, 62 Mo. 150; Houts v. Shepherd, 79 Mo. 141.

The judgment of the circuit court must, therefore, be reversed and the cause remanded for further hearing; and that court is directed to set aside the final settlement and ascertain, on a full accounting, the amount received by him with all interest due to the plaintiffs, and render a decree therefor; Martin, C., concurring; Philips, C., having been of counsel in the case, does not sit.

Norton, J., absent.

Wiles v. Robinson.

- WILES, Petitioner, v. Robinson and The Union Bank of Trenton, Appellants; Williams and Wife, Respondents; other Defendants not Contesting.
- Practice: AMENDMENT. The court did not err in permitting the filing of an amended answer at the trial in this case.
- A Fraudulent Contract. The evidence justified the court below in finding a contract in question in this case to be fraudulent.
- Payment by Note. The giving of a note for an existing indebtedness, is not a payment of the debt, unless it is given and accepted as such.

Appeal from Daviess Circuit Court.—Hon. S. A. Richardson, Judge.

REVERSED.

J. F. Hicklin, Geo. Hall, S. Perry and Gillihan & Brosius for appellant Bank.

Shanklin, Low & McDougal for appellant Robinson.

J. W. Alexander and W. C. Collison for respondents.

EWING, C.—This was a bill, in the nature of a bill in equity, by Wiles, as trustee of an express trust, showing to the court that there were conflicting claimants to the trust fund, and praying the court to construe the instrument creating the trust and direct how the money should be paid.

The answer of some of the appellants insisted that the instrument asked to be construed was not a deed of trust to secure the payment of certain named creditors, but a general assignment for the benefit of all the creditors. This question cannot be reviewed by this court, for the reason that the instrument is not in the record; is not preserved in the bill of exceptions; is not before the court, and hence cannot be examined and passed upon. The circuit court held it to be a deed of trust for the payment of the parties

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therein named, and its judgment must be conclusive as to that point.

The questions mainly contested in this case are as to the claims of William Robinson and Robert C. Williams. It will, therefore, be necessary to present the pleadings of those parties upon which these questions arise, and the evidence in relation to the contested claims. The controversy arises upon the pleadings of the defendants, as between themselves; all of them being beneficiaries in the deed of trust. The appellants are William Robinson and the Union Bank; but whose interests are by no means harmonious; they appealing upon separate bills of exception.

T.

The Union Bank, appellant, answered, denying that the defendant Robinson, as the security of Wynn, had paid the sums alleged, and, therefore, not entitled to re-imbursement from the trust fund; denying that the instrument was a deed of trust, and charging it to be a general assignment; alleging that Robinson had rented the land in the deed of trust from Wynn for 1877, and owed therefor \$1,800, and that he was thereby over-paid what he (Robinson) had paid for Wynn's security, and hence not entitled to any part of the trust fund.

The appellant William Robinson answered and denied that the deed was a general assignment, but alleged it to be a deed of trust; then setting up the sums of money he had paid for Wynn before the sale by the respondent trustee, denied that he owed Wynn \$1,800 for rent, and alleged that he had entered into a written contract with Wynn to pay \$730 rent, and asks to be re-imbursed out of the trust

fund.

Robert C. Williams answered that Melvina Wynn, one of the defendants, was one of the beneficiaries in the deed of trust, as shown by plaintiff's petition; that in January, 1877, Pembroke S. Wynn, with Melvina Wynn, executed and delivered their notes to the said R. C. Williams for

about \$800, and to Elinor Williams for about \$400; that prior to the sale by the trustee, Melvina Wynn, the security, paid off and fully discharged the said two notes amounting to about \$1,200; that afterward, in November, 1877, the said Melvina Wynn sold and assigned to this defendant, R. C. Williams, all her right, title and interest in the trust fund in plaintiff's hands accruing to her as one of the beneficiaries by reason of having paid off said debt as security; and asks judgment for Melvina Wynn's interest by reason of the assignment to himself.

The other pleadings are practically unimportant for the determination of the case, except the reply of the Union Bank to the answer of the said Robinson, wherein it is alleged that the written contract for rent between said Robinson and Pembroke S. Wynn was entered into to hinder, delay and defraud the creditors of said Wynn; and that said Robinson rented said land and took charge thereof under and by virtue of an oral agreement, and not under the written contract.

The evidence concerning the claim of Robinson was substantially as follows: Robinson himself testified that he paid the claims mentioned in the deed of trust upon which he was security; giving names, dates and amounts aggregating \$1,623.61, and all paid before the sale by the trustee. The witness then produced the written contract between himself and Pembroke S. Wynn, which was in substance that he had rented the land and certain teams and farming implements for 1877 and was to pay therefor \$730. He was then examined as to the annual rent value of the land; out of which he testified he realized some \$450, after paying what he had advanced. He also testified that before he entered into the written contract with Wynn he knew Wynn owed one Ashbrook, who had sued him, and that Wynn wanted the rent to go to his securities rather than that it should go on Ashbrook's execution. Other evidence tended to show the annual rental value for

1877 of the farm Robinson rented was about \$1,600 or \$1,700.

Wynn was then introduced, who testified that the contract made in writing was merely drawn up and executed with a view of "keeping Ashbrook off; we were to be governed by the verbal agreement. The verbal agreement was that Robinson should furnish the money to pay taxes in Daviess and Grundy counties, also a coupon I owed for \$200. I was to run the farm and control and manage it in the name of bobinson. I was to make all I could off of the farm, and was to pay the proceeds to Robinson to reimburse him, first for the money he might furnish in paying coupon and taxes, and next on the debts for which he was security for me as specified in the deed of trust, until fully paid, and the balance, if any, to other securities mentioned in the deed of trust."

This was substantially the evidence as far as the Robinson claim was concerned, except that the interest of Wynn therein was assigned to DeBolt.

The claim of Robert C. Williams was then taken up and to sustain the same Williams was himself sworn as a witness, and testified as follows: "About the 10th day of November, 1877, Melvina Wynn lifted the notes—one payable to me and one to my wife, Mrs. E. Williams-mentioned in the deed of trust, by giving her individual note in their stead. The new note was for the principal and interest of the two notes mentioned, and was for \$1,227.03. She gave me her individual note only, and this I accepted in full payment of and for two notes I gave up. I gave or sent blank note to P. S. Wynn and requested him to get her to sign it. P. S. Wynn delivered me the renewal note on the morning of the trustee's sale, November 24th, 1877; I then delivered him the two notes mentioned in the deed of trust to deliver to Mrs. Wynn. After the trustee's sale I went to see Mrs. Wynn, and told her that she or I, one, had the right to draw a proportion of the proceeds of trust sale. She said she could not pay her note; if I could get

anything from trustee I might; she did not assign me her claim in writing, but she gave me all her interest in the proceeds in the hands of the trustee, and I agreed to give her up the new note I held on her alone for the proceeds of the sale in the hands of the trustee coming to her, and the said note has at all times been subject to her order, and she is entitled to it, and can get it at any time. I don't claim to own it." The evidence then tended to prove that Melvina Wynn pretended to pay off the Williams notes by giving her own in their stead; that she was insolvent; that Williams knew it; that she never paid the notes she gave; that the transaction was avowedly made to keep "Robinson from gobbling up" the whole of the trust fund.

II.

As to the claim of William Robinson. He complains of the action of the court in permitting the Union Bank to amend its answer on the trial, setting up that he (Robinson) rented the farm from Wynn and held it under a verbal contract and not under the written agreement. This was not error. It could not have injured the defendant Union Bank, because there seems to be no doubt but that such verbal agreement was made between Robinson and Wynn. If it had been a surprise to the bank it could have had a continuance upon proper terms if the right and legal course had been pursued at the time.

III.

We are of opinion the court below was justified by the evidence in holding that the written contract between Robinson and Wynn, for the rent of the farm for 1877, was made to hinder, delay and defraud the creditors of Wynn. The evidence tended to show that the rental value of this farm was more than double the amount Robinson agreed to pay under the written contract; that it was made with the view of "keeping Ashbrook off;" that Robinson knew of Ashbrook's claim at the time, and knew that Wynn did

not want Ashbrook to get anything under his execution. The circumstances all tended to prove that the object of Wynn was to cover up what might be made out of the farm, and Robinson knew it. We are not, therefore, disposed to interfere with the finding of the circuit court upon this question. If this contract was void, of course DeBolt's assignment thereof was worthless. An assignment of a void contract could confer no rights on the assignee. finding of the court as to the written contract leaves the verbal agreement between Robinson and Wynn the only contract which governs the rental of the farm for 1877; under which the evidence justifies the conclusion of the circuit court. It is true the evidence shows that Robinson had possession and use of the farm for only a part of the year, yet that part, from April to September, was sufficient for him to harvest all his corn and hay, in which it was principally cultivated.

IV.

The next question arises upon the claim of Williams. In its finding upon this claim we are of opinion the circuit court erred. The evidence to show that Mrs. Melvina Wynn had paid off all or a part of the debt for which she was security, as contemplated, is not sufficient. It only shows that she gave her note for the amount, but the note was not paid, and she was insolvent when she gave it. There was no consideration, therefore, passing from Williams to her for any interest she might have in the trust fund. She could have no interest therein until she had paid the money. Hence there was nothing she could assign. The giving of her note was not a payment of the debt unless it was so given and accepted, and the evidence does not bear such construction. Leabo v. Goode, 67 Mo. 126; Pitzer v. Harmon, 8 Blackf. 112; Romine v. Romine, 59 Ind. 346.

The judgment of the circuit court is, therefore, reversed and the cause remanded, with instructions to enter The State v. Davis.

up judgment in accordance with this decision. All the commissioners concur.

NORTON, J., absent.

THE STATE V. DAVIS, Appellant.

Larceny: EVIDENCE OF PRISONER'S POSSESSION OF BURGLARS' TOOLS. On a trial for larceny from a dwelling-house, it appeared that defendant was arrested in the vicinity of the locus delicti immediately after the commission of the larceny, under suspicious circumstances tending to connect him with the crime. It also appeared that divers rooms, closets and drawers in the house were ransacked; but there was no evidence that burglars' tools had been used to effect the entry or to open inner doors or drawers. Held, that evidence that the defendant, when arrested, had such tools in his possession was nevertheless admissible.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Thos. B. Harvey for appellant.

D. H. McIntyre, Attorney General, for the State.

Hough, C. J.—The defendant was indicted for and convicted of a larceny from a dwelling-house. There was no evidence of any burglarious entry, nor was there any testimony showing that inner doors or drawers had been opened by means of burglarious instruments, although divers rooms, closets and drawers were shown to have been ransacked and various articles of dress and ornament abstracted. The defendant was arrested in the vicinity of the locus delicti immediately after the commission of the larceny, under suspicious circumstances tending to connect him with the crime. Certain implements were found in his possession at the time of his arrest, which were thus de-

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scribed by the officer making the arrest-we adopt the statement of the court of appeals: "I found in the wagon, right under the seat on the bottom of the wagon one loaded revolver, a billy and a jimmy or outsider, a burglar's tool. That is the pistol. That is the jimmy or burglar's tool. It is used to catch a key from the outside and unlock it: that is for pushing it through the key-hole and turning the key. The character of the instrument is for opening keys in doors or drawers or closets. It is used for that either on the outside or inside of the house." The sole question in this case is as to the admissibility of this testimony. It is contended on behalf of the defendant that it is incompetent, on the authority of the People v. Winters, 29 Cal. 658, where it is said: "If it appears from the evidence in the case that the defendant was in the vicinity at or about the time the burglary was committed, and that it was committed by the aid of burglarious tools, the possession by the defendant at or about that time of corresponding tools may be shown, because by such evidence it is shown that the defendant had the means to commit the offense in the mode in which it was committed, and because the possession of the means by which the offense was actually committed, is a circumstance which tends, when other circumstances do not oppose but agree with it, to connect the accused with the commission of the offense. But if it appears from other evidence that the burglary was not committed by means of burglarious tools, as where the burglar has entered by means of an open door or window, the possession of burglarious tools cannot be shown; because, so far as the case shows, there is no connection probable or possible between it and an offense confessedly committed without the aid of such tools," etc.

The court of appeals, while recognizing the correctness of this decision, observes in its opinion: "If there was no probable connection between the possession of these tools and the offense committed, then the introduction of this testimony would have been error. To this extent the

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cases cited by appellant in his brief clearly go. The possession of burglar's tools does not tend to connect the person having them with the commission of rape or petit larceny. But the possession of tools which are equally adapted to the commission of burglary and of the offense charged, does not become unimportant merely because the tools or some of them are called burglar's tools and the offense is not called burglary. It is obvious that men who set out to commit larceny by stealing from a dwelling-house in the night-time, and who commit the offense by ransacking the closets and wardrobes of two stories of the dwelling whilst the family are at supper, are very probably provided with some implements which burglars use, weapons of offense and defense, such as a pistol and a billy, and instruments for turning keys, such as an outsider, which may be as necessary to commit larceny by opening an inner room as to commit burglary by opening the lock of an outside When no burglary has been committed, door. but an offense has been committed for the commission of which certain tools also used by burglars are appropriate, and which offense is not likely to be attempted in the manner detailed in the evidence by persons not having such tools about them at the time, and such tools, apt for the commission of the offense, are found upon persons in the vicinity under the circumstances of the present case, it would be impossible to say that the possession of such tools was not an important link in the chain of circumstantial evidence."

We do not regard these views as being entirely in harmony with the doctrine announced in the *People v. Winters*, as it does not appear that the larceny in the present case was committed by the aid of any tools or implements such as were found in the possession of the defendant. We fully concur, however, in the views expressed by the court of appeals, and feel constrained to withhold our approval from the doctrine of the case cited. If a burglary has been committed without the aid of burglarious instruments, as

for instance by raising a sash, and immediately after the commission thereof a person is arrested going from the scene of the crime, as in this case, under circumstances tending to connect him with the commission of the offense, and such person has in his possession burglarious implements, we see no good reason why the possession of such implements may not be shown as a circumstance tending to prove, when taken in connection with other suspicious circumstances, that such person committed the offense. Such testimony undoubtedly shows that such person was prepared to enter the house by any means which it might be necessary to employ, and the fact that it was not necessary to use one, or all, or any of such implements, will not, we think, render evidence of the possession of such implements inadmissible.

The judgment of the court of appeals affirming that of the criminal court is hereby affirmed. All the judges concur.

ALLEN V. DERMOTT, Plaintiff in Error.

- Deed of Trust: SATISFACTION BY STRANGER: SUBROGATION. Where a land owner, to save his land, pays a note secured by a deed of trust executed by a former owner, and upon which he is not legally liable, the debt is not thereby extinguished; he is subrogated to the rights of the holder as against the maker.
- The holder of a secured note may sue on the note without enforcing his security.

Error to Jasper Criminal Court.—Hon. Joseph Cravens, Judge.

AFFIRMED.

Harding & Buler for plaintiff in error.

W. M. Robinson for defendant in error.

MARTIN, C.—The plaintiff sued upon a promissory note made by the defendants, dated May 9th, 1877, and payable in the sum of \$359.50 to one John Webb, who assigned the same to plaintiff. It does not appear from the record that any writ of summons was issued in the case. Dermott appeared and pleaded payment. Afterward this plea was withdrawn or superseded by an amended answer in which he denied each and every allegation of the petition. In the same answer he proceeded to state a special defense, which is very long, and may be stated in substance as follows: That on the 9th day of May, 1877, the defendant Dermott and his co-defendant Stringer, conveyed by mortgage a lot in Jasper county to J. C. Webb to secure the note held by him; that in July, 1877, the defendants entered into a "trade" with one Catharine Sharp, by which they conveyed the Jasper county lot and other property to her in exchange for 160 acres of land in Dade county and other property; that the Dade county land was to be and was conveyed to the defendant Stringer, and that Stringer in consideration thereof assumed the payment of the whole of the mortgage resting on the Jasper county lot, and, for the purpose of indemnifying Mrs. Sharp against the mortgage resting on the lot conveyed to her, gave her back a mortgage on the Dade county lot received from her; that afterward Stringer conveyed the Dade county lot to one John A. Allen, "who took the same subject to the indemnifying mortgage aforesaid, and with notice thereof;" that upon threats from Mrs. Sharp that she would foreclose the mortgage on the Dade county lot, said John A. Allen "went to said John C. Webb and paid off the said note in full."

To this statement the defendant adds the following words, which, on motion of plaintiff, were stricken out: "Defendant further says that as to whether the said note was assigned to plaintiff or not, he does not know, but that

if it was, then the assignment was merely colorable and made for the purpose of concealing the fact that the said note was fully paid, and that the said note is not really the property of the said Samson R. Allen, but was paid off and discharged by the said John A. Allen to protect his property from sale thereunder." The answer then goes on to say that if the note in suit should turn out to be the property of the plaintiff, it still remains secured by the original mortgage on the Jasper county lot, which is more than sufficient to satisfy the same; that said lot is claimed to be owned by one Shapley, of Barton county, who took his title subject to said mortgage; that Stringer is insolvent. By reason of these facts the defendant avers that said note has been paid so far as he is concerned. He then asks that if the plaintiff, notwithstanding these facts, "will persist in prosecuting this suit" he be required to make Allen and Shapley parties to it, and to first exhaust the mortgaged property before proceeding further against him.

After the motion to strike out had been sustained, the case went on to trial. The defendant offered no evidence and judgment was given for plaintiff against Dermott alone. Whether the other defendant was served with process or for what reason judgment did not go against him also, does not appear in the record. The defendant saved his exceptions to the action of the court in striking out the words designated by us, and brings the case here on writ of error.

The court committed no error in sustaining the motion to strike out. It is unnecessary to consider the import of 1. Deed of the answer as left after the motion was satisfaction by sustained, or to waste time in comparing tion. the language stricken out with that which remained. This further answer, as it is termed by the pleader, did not as a whole contain any defense to the suit. If the court had stricken out the whole of it, there would have been no error. Therefore there could be no error in striking out any part of it. In this special defense the de-

fendant recites certain facts which he claims constitute a payment of the note so far as he is concerned, but they fall short of such a result, for reasons which I will briefly state. The holder of the note, J. C. Webb, was no party to the arrangement by which one of the defendants assumed to pay the whole note. John A. Allen is not alleged to have assumed the payment of it. The averment that he purchased the Dade county land with notice of the mortgage to indemnify Mrs. Sharp as against the note, and subject to the mortgage, is not equivalent to an allegation that he assumed the payment of the note and mortgage. Therefore a statement that he paid the note, not by virtue of any agreement to do so, but to save his land from being sacrificed, does not constitute a payment of the note, which must be done by the defendants or by some one bound to them by contract to do it, or by some one who did it in their interest and for their use. When John A. Allen paid the note to save his land from being sold, he became entitled in law to take the place of Webb as against the makers of it, and he could assign and deliver it to any one he pleased. Not being bound by agreement to pay it, he, by paying it to save his estate, became subrogated to the rights of the holder of it, as against the makers, who, so far as Webb and Allen were concerned, were primarily hable on the note. Kellogg v. Schnaake, 56 Mo. 136; Wolff v. Walter, 56 Mo. 292; Swope v. Leffingwell, 72 Mo. 348; Orrick v. Durham, 79 Mo. 174. It is only when a person is primarily bound by contract to pay a note that his payment of it works an extinguishment and satisfaction of the obligation, and then only as to those to whom he is bound.

That part of the answer in which the defendant alludes to the existence of the real estate security for the note and 2— prays for an order compelling the plaintiff to resort to such security constitutes no defense. The personal obligation can be enforced irrespective of the security. Thornton v. Pigg, 24 Mo. 249. The case of Wilcox v. Todd, 64 Mo. 388, does not intimate anything to the contrary.

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In that case the holder of the property pledged as security was compelled, at the instance of a surety who owned a part of the property pledged, to exhaust the principal's part of the security before resorting to the part owned by the surety. It was not held that suit should have been instituted or sale advertised to enforce the security before suit on the personal obligation.

All concurring, the judgment is affirmed.

Norton, J., absent.

THE STATE V. BRITTON, Appellant.

Venue. Judgment reversed for want of proof of venue.

Appeal from Newton Circuit Court.—Hon. Joseph Cravens, Judge.

REVERSED.

A. J. Harbison for appellant.

D. H. McIntyre, Attorney General, for the State.

HOUGH, C. J.—It is conceded by the Attorney General that the testimony, as preserved in the bill of exceptions in this case, fails to prove the venue as laid in the indictment. This omission is of course fatal, and without examining any other question presented by the record, (the appellant having failed to file a brief,) we reverse the judgment and remand the cause. All the judges concur.

The State ex rel. Colvin v. Six.

THE STATE ex rel. COLVIN V. SIX et al., Appellants.

- Justices' Courts: CHANGE OF VENUE: JUDGMENT. A judgment entered by a justice of the peace after a change of venue has been applied for, in due form, is erroneous, but cannot be treated as a nullity in a collateral proceeding.
- 2. Execution: REPLEVIN OF PROPERTY LEVIED ON: SECOND EXECUTION. An execution was levied on personal property of the defendant sufficient to satisfy it. Before sale the property was taken out of the hands of the officer by replevin at the suit of a person who claimed it by purchase from the defendant after the levy. Thereupon a second execution was issued and a levy and sale were made thereunder. In an action against the officer making them; Held, that such a purchaser could not maintain replevin, that the property therefore remained in custodia legis and operated sub modo as a satisfaction of the first execution, and that the issuing of the second and the levy and sale under it were therefore unlawful, and the officer was liable accordingly.

Appeal from Johnson Circuit Court.—Hon. Noah M. Givan, Judge.

AFFIRMED.

S. P. Sparks for appellants.

J. P. Orr and O. L. Houts for respondent.

Norton, J.—This is a suit at the relation of Andrew Colvin against defendant Six and his sureties on a constable's bond. On the trial plaintiff had judgment, from which the defendants have appealed.

The breach of the bond assigned in the petition is in substance that on the 18th day of January, 1879, an alias execution was issued on a judgment rendered against plaintiff by W. C. Smith, a justice of the peace, which was delivered to defendant Six, who was the constable of the township, and who levied the same on eight head of hogs belonging to plaintiff and sold the same; that said alias execution was void; that it was issued on a judgment rendered by said justice that was void because he had no juris-

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diction either of the person of plaintiff or the subject matter of the suit; all of which was well known to said Six at the time he received the execution; that prior to the issuance of the *alias* execution an execution on the same judgment had been issued against plaintiff which had been levied on sufficient personal property of plaintiff's to satisfy said execution.

The defendant in his answer admits that he received the alias execution, levied it upon the hogs and sold them by virtue of the power it gave him, plaintiff being present at the sale, ordering and directing the manner of the sale; that the proceeds thereof were applied to the satisfaction of the execution, except \$4, which he tendered and offered

to pay over to plaintiff.

On the trial it appeared in evidence that plaintiff in 1. JUSTICES COURTS: this suit, and who was defendant in the change of venue suit before the justice who rendered the judgment upon which the execution issued, previous to the trial appeared before the justice and applied for a change of venue, which the justice overruled, whereupon plaintiff abandoned the case, and the justice proceeded to try it and rendered judgment. It is contended by plaintiff's counsel that after he made his application for a change of venue complying with the statutory requirements in making it, the justice had no other jurisdiction of the same than to order the change and to send the case to another justice, and that the judgment rendered by him was a nullity. This precise point was raised at the present term in the case of Colvin v. Six, 79 Mo. 198, where the identical judgment here drawn in question was held not to be a nullity, and that an execution upon it gave full authority and protection to Six, the constable, in executing it. The circuit court evidently tried that case, as well as the one now under consideration, on the theory that the judgment of the justice was a nullity, and the instructions asked by defendant bearing upon that point, and refused by the court, ought to have been given.

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It is also claimed by counsel for plaintiff that the first execution which issued on the judgment was levied upon 2. EXECUTION: re- two horses, the property of A. Colvin, of plevin of property the value of \$100, and more than sufficient to pay the execution; that this levy operated as a satisfaction of the judgment, and that the second execution was, therefore, issued without warrant of law The defendants' counsel on the other hand and was void. insists that inasmuch as the return of the constable on the first execution showed that the horses levied upon had been taken out of his possession by a writ of replevin which was issued in a suit begun by B. F. Colvin for the recovery of the possession of the said horses, the justice of the peace was warranted in issuing a second execution, and this execution warranted the defendant, who was constable, levying upon and selling the property of the defendant therein, sufficient to satisfy the same.

There can be no question that when sufficient personal property of a defendant in an execution to pay it, is levied upon, it operates as a satisfaction if nothing more appears, and so long as said property may be held under the levy undisposed of, no second execution can be issued. This has been substantially announced as the doctrine of this court in the following cases: Blair v. Caldwell, 3 Mo. 354; Moss v. Craft, 10 Mo. 720; Williams v. Boyce, 11 Mo. 537; Blackburn v. Jackson, 26 Mo. 308; Thomas v. Cleveland, 33 Mo. 126.

The principle governing in such cases is thus stated in Freeman on Judgments, section 475: "A levy upon personal property sufficient in value to satisfy the execution is frequently said to operate per se as an extinguishment of the judgment * * . None of the decisions assume that a levy produces an absolute satisfaction. It is only satisfaction sub modo; the levy must be fairly exhausted before further proceedings can be taken, and while these proceedings are going on the plaintiff cannot have another execution * * . After the levy, if the sheriff waste

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the property or it is lost through his neglect, the satisfaction is absolute. If without fault of the plaintiff or of the sheriff the levy does not produce proceeds sufficient to satisfy the execution, then the plaintiff is entitled to proceed for so much as remains unpaid, as if no levy had been made. If after levy upon sufficient personal property the court orders that the judgment be not enforced, the order releases the levy but does not discharge the judgment. The restoration of the property to defendant at his request or by some act for which he is responsible prevents the levy from operating as a satisfaction so far at least as his rights are concerned * . It is apparent that the satisfaction, if such it may be called, produced by a levy on personal property is liable to be removed by a variety of circumstances." "While a levy is prima facie satisfaction of an execution, it is not an absolute satisfaction, like actual payment. If the property is given up to the debtor, or if he wrongfully take the property, or do any other act by which the fruits are destroyed, he cannot claim it as satisfaction, or where it is released by the creditor and restored to the debtor at his request, or by some act for which he is responsible; or if taken from the officer by due course of law." Herman on Ex., § 176, p. 256.

In the light of the facts in this case, and the authorities referred to, it is the opinion of all the members of the court, except myself, that the taking of the horses levied upon by the first execution out of the possession of the constable by the writ of replevin sued out by B. F. Colvin, the purchaser from A. Colvin the defendant in the execution, after being levied on, did not authorize the issuance of the second execution, nor justify the levy and sale thereunder of the hogs of plaintiff, inasmuch as the horses levied upon were in custodia legis and could neither be replevied by the defendant in the execution nor his vendee who bought after such levy. Wells on Rep., §§ 243, 244. See also Freeman on Ex., § 268, where it is said: "Another consequence of taking property under execution is, that it

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is put in custody of the law, and cannot be levied upon by any other officer, nor can it be replevied from the officer in whose charge it is, by the defendant or any one claiming title under him subsequent to the levy."

Judgment affirmed. All concur.

PICKEL V. THE ST. LOUIS CHAMBER OF COMMERCE ASSOCIA-TION, Appellant.

Account Stated: FOR WHAT OPENED. After the completion of a building the owner and the builder had an accounting and settlement, and the owner, without making any claim for damages caused by delay in the prosecution of the work, gave his note for the balance found to be due. Held, that in the absence of fraud (in procuring the settlement, mistake in making it, or ignorance of his rights when it was made, the owner could not defend against the note on the ground that there had been such delay resulting in damage to him.)

Appeal from St. Louis Court of Appeals.*

AFFIRMED.

V. W. Knapp for appellant

C. F. Moulton for respondent.

Henry, J.—This case is here on appeal from the judgment of the St. Louis court of appeals. It is a suit on a note for \$5,000, executed by defendant to plaintiffs, June 20th, 1876, and payable one day after date. The defense was a counter-claim for alleged delays in the stone-work, which plaintiffs agreed to perform on the Chamber of Commerce building in the city of St. Louis, under a written agreement, by which a fixed sum per day was to be allowed by plaintiffs to defendant for delays. After the completion of the building the architects under the agreement stated

^{*}See 10 Mo. App. 191.

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the account between the plaintiffs and the defendant in writing, showing the work done under the contract, and extra work, and the prices and payments made to plaintiffs, showing a balance due plaintiffs of \$36,061.85. This was approved by Geo. Knapp, chairman of the building committee, and all of said balance was paid to plaintiffs, except the amount for which the note in suit was given. This statement of the account was made March 20th, 1876, and the note was executed three months subsequently. Neither in the statement made by the architects, nor when the money was paid and the note was given, was any allusion made to any claim the defendant had against plaintiffs for delays in the prosecution of their work, and the court of appeals held, and properly we think, that in the absence of fraud in procuring it, mistake in making it, or ignorance of its rights when the settlement was made, defendant was precluded by the settlement from recovering on its counterclaim. In addition to the cases recited and relied upon by the court of appeals to sustain the conclusions it reached, we think the doctrine announced by that court fully sanctioned by Haysler v. Owen, 61 Mo. 270, and Johnson Co. v. Lowe, 72 Mo. 637. When the settlement was made the defendant was not ignorant of any delays in the prosecution of plaintiffs' work, but was fully aware of the delays and what occasioned them.

The judgment is affirmed. All concur, except Norton, J., absent.

THE STATE V. VANSANT, Appellant.

- Dying Declarations. To be admissible in evidence, dying declarations must relate to the identification of the prisoner or the deceased, or to the act of killing or to the circumstances attending the act and forming part of the res gestae. Hence, where the declaration was: "I believed he (defendant) was going after his pistol when he went into the house.
 I had seen him at the house with a pistol before;" Held, that this ought to have been excluded.
- 2. Dying Declarations are in their nature secondary evidence, and are so regarded in the law. It is, therefore, error to instruct a jury to give them the same weight they would if the declarant had testified before them.
- 3. Homicide. A series of instructions on the law of homicide, including self-defense, approved.

Appeal from Jackson Criminal Court.—Hon. H. P. White, Judge.

REVERSED.

The instructions given to the jury were as follows:

1. If you shall find and believe from the evidence that at the county of Jackson, State of Missouri, at any time prior to the 31st day of May, 1883, the day on which the indictment in this cause was filed, the defendant John Vansant, in the manner and by the means specified in the indictment, willfully, with deliberation, premeditation and malice aforethought, assaulted and wounded the deceased, Porter Armstrong, and that within one year and a day thereafter, and before the filing of said indictment, the said Porter Armstrong, at the county and State aforesaid, died from the effects of the wound so inflicted upon him by the defendant, the verdict should be that defendant is guilty of murder in the first degree.

2. If you shall believe and find from the evidence that, at the county of Jackson, State of Missouri, at any time within three years next before the filing of the indictment in this cause, the defendant, John Vansant, in the manner

and by the means named in the indictment, willfully assaulted and wounded the deceased, Porter Armstrong, and that within one year and a day thereafter, and before the filing of said indictment, the said Porter Armstrong, at the county and State above named, died from the effects of such wound, but shall further believe and find from the evidence that at the time of such assaulting and wounding he, the defendant, was so far under the dominion of passion. in consequence of blows inflicted upon or indignities offered to his person by the deceased, as to make him regardless of the admonitions of reason and incapable of thinking coolly of the nature and consequences of his act, the verdiet should be that the defendant is guilty of manslaughter in the fourth degree. You must bear in mind in this connection that it is the passion resulting from the provocation named above, not the provocation itself, which reduces the grade of the offense from murder to manslaughter. Consequently, although you may believe that there may have been the necessary provocation according to the instructions to produce a passion such as is described in this instruction, still if such provocation did not produce such passion, or having produced it there was sufficient time for the blood to cool before the killing, there is in the act of killing no grade of the offense below that of murder in the And the court further instructs you that whether a provocation such as is described in this instruction was or was not given the defendant, you must determine. If you find that such provocation was given, you must then determine whether it produced the passion necessary to reduce the grade of the offense, and in case you find that the provocation did produce such passion you must then determine whether sufficient time elapsed between the production of such passion and the killing for the blood to cool.

3. If you shall believe and find from the evidence that the defendant, in the manner and by the means named in the indictment, assaulted and wounded the deceased,

Porter Armstrong, but shall also find and believe that in so doing he, the defendant, was acting in the necessary defense of his person, you should not find him guilty of any offense whatever. To acquit on the ground of self-defense it must appear that a party was apprehensive, in consequence of the acts of the deceased, that injury of a bodily nature to himself was impending and about to fall on him. and that the taking of the life of the deceased was, under the circumstances, apparent or actual, necessary to prevent such injury. If, therefore, you shall believe from the evidence that from the conduct and acts of the deceased at the time he was wounded, by the defendant, (if you find that he was wounded by the defendant,) he, the defendant, had reasonable cause to believe and did believe that the deceased was about to do him some great bodily harm or take his life, and that he, the defendant, had reasonable cause to believe and did believe that there was danger of the deceased executing his purpose and accomplishing his design, and that he, the defendant, wounded the deceased for the purpose of preventing such execution and such accomplishment, the verdict should be that the defendant is not guilty, because such wounding, under such circumstances, is justifiable in law because it was done in self-de-You must observe that in order to acquit on the ground of self-defense it is not necessary that the danger of death or injury to which the defendant believed himself exposed was real or actual, or that it was impending and about to fall on him. It is only necessary that it should appear to you that the defendant so believed himself to be exposed to such danger and that his belief was reasonable, considering the circumstances of the case as proven, and the situation of the parties at the time, and that he acted in good faith upon the situation as it appeared to him and under a real apprehension of danger to himself.

4. The law of self-defense does not imply the right of attack, nor will it permit of acts done in retaliation or for revenge. Therefore, if you shall believe and find from the

evidence that the defendant sought, brought on or voluntarily entered into a difficulty with the deceased for the purpose of wreaking vengeance upon him, or if you shall find and believe that he wounded the deceased at a time when he had, because of the acts of the deceased, no reasonable apprehension of immediate and impending injury to himself, and did so from a spirit of retaliation and revenge for the purpose of punishing the deceased for past injuries done him, the defendant, then the defendant cannot avail himself of the law of self-defense, and you should not acquit on that ground. And the court further instructs you that in case you find that the defendant sought, brought on or voluntarily entered into a difficulty with the deceased, it does not matter in the application of the law of selfdefense how great the danger or imminent the peril to which the defendant may have believed himself to have been exposed during such difficulty.

5. You should consider any threats which you may believe from the evidence were made by the deceased against the defendant, and give them such weight in determining the nature of the transaction giving rise to the charge for which the defendant is now upon trial as you deem proper. Mere threats, however, will not justify on the ground of self-defense the wounding alleged in the indictment; nor will threats alone warrant the party against whom they are made in attacking or killing the party who made them.

6. The character of the deceased is a proper matter for your consideration, and you should give it such weight as you deem proper in determining whether or not he, by his acts at the time of the wounding, gave the defendant reasonable cause to apprehend such danger as to justify his act of wounding on the ground of self-defense according to the law upon that subject as stated in these instructions. The mere fact, however, that the deceased was a man of bad character, if you believe he was of such character, will not justify the taking of his life.

7. The character of the defendant is also a matter for

your consideration. The evidence as to his character should be given such weight in explanation of the transaction between himself and the deceased as to you seems proper. But if you shall conclude from all the evidence that the defendant is guilty, you should not acquit him because you may believe that he has heretofore been a person of good repute.

8. You are sole judges as to the weight of evidence and the credibility of witnesses, and if you believe that any witness has sworn willfully falsely as to any material matter in controversy, you are at liberty to disregard or reject the whole of such witness' testimony. In passing upon the credit of any witness and the weight to be attached to his or her testimony, you should, in connection with all the other facts and circumstances proven, take into account the conduct and appearance of such witness upon the stand, the interest of such witness in the result of the trial, the motives actuating the witness in testifying, the probability of the statements of such witness, and his or her inclination to speak truthfully or otherwise as to matters within his or her knowledge.

9. The statement in writing read to you as the dying declaration of the deceased, Porter Armstrong, is to be received by you as such dying declaration. But because it is a dying declaration you are not necessarily bound to believe it. You should consider it in the same manner that you would consider it had the said Armstrong testified before you, and in determining the weight to be attached to it you should be governed by the rules for determining the weight of testimony specified in instruction number eight.

10. In considering what the defendant has said since the fatal shooting, if you believe he has said anything in relation thereto, you should consider it all together. He is entitled to the benefit of what he said for himself, if true, as the State is to the benefit of what he said against himself. In any conversation of defendant proved by the State, what he said against himself the law presumes to be true

because against himself, but what he said for himself you are not bound to believe because said in a conversation proved by the State. You may believe it or disbelieve it as it may be shown to be true or false by all the evidence in the case.

11. In law a person accused of crime is presumed to be innocent. This presumption entitles him to an acquittal unless it is overcome by evidence which establishes his guilt beyond a reasonable doubt. A juror is understood to entertain a reasonable doubt when he has not an abiding conviction to a moral certainty that the party accused is guilty as charged. You should acquit the defendant if you entertain a reasonable doubt as to his guilt, and you should also acquit if it is as reasonable, considering all the facts or circumstances proven to conclude that he is innocent, as to conclude that he is guilty, or if all the facts and circumstances can be reasonably reconciled with any theory other than that of his guilt. A doubt, to authorize an acquittal, however, should be reasonable and substantial, and one fairly deducible from the evidence considered as a whole; a mere possibility that the defendant may be innocent will not warrant a verdict of not guilty.

12. If you find the defendant guilty of murder in the first degree, you will simply so state in your verdict. You are charged with no duty respecting the punishment in case of conviction for murder in the first degree. If you find the defendant guilty of manslaughter in the fourth degree, you will so state in your verdict, and assess his punishment at imprisonment in the State penitentiary for a term of two years, or at imprisonment in the county jail not less than six months, or at a fine not less than \$500, or at both a fine not less than \$100 and imprisonment in the county jail not less than three months. If you find the defendant not guilty you will simply so state in your verdict.

Peak, Waddill & Wofford for appellant.

D. H. McIntyre, Attorney General, for the State.

Hough, C. J.—The defendant was indicted in the criminal court of Jackson county, at its May term, 1883, for the murder of Porter Armstrong. The only witness of the homicide was a colored cook at a hotel in the city of Independence, where the homicide occurred. She testified as follows: I have lived at Independence several years; know John Vansant. He was working at the Farmers House. I know Porter Armstrong; was working at the Farmers House when Armstrong was shot. Armstrong was shot in the back-yard at hotel. I was finishing up my work, cleaning the dishes in the kitchen; put on my things to start home; went back to tell Vansant to get some things and met him in the office with a pistol; saw Armstrong come out of the dining-room and go through the kitchen into the back-yard. This was before I saw Vansant. Vansant came out of the dining-room into the kitchen and went to the back-door. Armstrong was in the back-yard. As soon as Armstrong saw Vansant, he raised up the rock to throw at him, and Vansant fired at him. Armstrong was standing by a tree in the back-vard. I could not tell whether Vansant shot as soon as he came to the door; saw Armstrong and Vansant playing cards in the dining-room before the shooting. After the shooting Armstrong holloaed and went to the gate; Vansant went back into the office. Armstrong picked up the brick when he saw Vansant coming with a pistol. Armstrong was standing right in front of Vansant, facing him, when Vansant shot. Armstrong raised the brick back this way, to throw, and Vansant shot him. This shooting occurred in Jackson county, Missouri, in April, 1883.

The dying declaration of Armstrong was read in evidence, against the objection of the defendant, as follows: My name is Porter Armstrong. I am twenty years old. The doctor tells me I am going to die, and I believe it;

knowing that I am about to die, what I now say is true: John Vansant and I were in the dining-room at the Pacific Hotel playing cards; I beat him; and he wanted to go to cheating. After I had won his money he grabbed it up; I grabbed him round the neck and took it away from him. After I took it away from him he called me a son-of-a-bitch, and I struck him with my left hand. Then he walked into the office and I went out through the dining-room and kitchen, out doors, and stopped out there. After I got out doors Vansant came to the door of the kitchen with a pistol and called me a son-of-a-bitch, and snapped the pistol at me. He presented it to me the second time, snapped it and it went off and shot me. I did not have any weapon of any kind. When I went out doors I picked up a rock; but did not throw it at him. Vansant was standing in the kitchen door. He was about nine feet from me. He snapped the pistol at me as soon as he got to the door. I believed he was going after his pistol when he went into the office. I had seen him at the house with a pistol before.

The defendant testified as follows: I do not know my age exactly; am about eighteen or nineteen; have known Porter Armstrong several years; never had anything to do with him until after I commenced working at the Farmers House; have been working there off and on two years. On the day of the shooting I was doing some work in the dining-room. It was about three o'clock; Armstrong was in the kitchen talking to the cook, Missouri Crow. He came into the dining-room and asked me to play a game of cards. I told him I did not have time. He insisted. I told him I could not play until I had finished my work. I then went into the office and washed the ice and put it in the cooler and returned to the dining-room. Armstrong still insisted on a game of cards. I then finished up my work in the dining-room, and went back into the office and got the cards and came back, and we played five up for cigars. We played several games and he beat, and then I commenced beating him, and he said I was swindling him;

he then cussed me, and called me a damn-son-of-a-bitch, and grabbed me. I told him I would give him back all the money I had won from him rather than have a difficulty. I had won twenty-five cents worth of cigars from him. gave him a quarter, and he demanded ten cents more. told him I did not owe that and would not give it to him. He then cussed me and struck me in the face. I staggered, and before I could recover myself he struck me again and knocked me down. I then jumped up and ran into the office; waited there a moment, and supposing he had left the dining-room, I returned to the dining-room to get some soiled napkins I had left on the sideboard. When I got near the sideboard Armstrong sprang up from behind a table with a razor in his hand, saying, "God damn you, I have got you now." I ran back into the office and shut the door; opened my valise and took out a pistol; thinking I heard Armstrong coming around the house to the front door of the office, I started back through the dining-room to go into the kitchen so as to avoid him; heard some one coming around the house toward the front door of the office and thought it was Armstrong; went into the kitchen and had my pistol in my hand. When I got to the kitchen door I saw Armstrong standing in the yard near a tree, about ten feet from the door, with a large brick in his hand drawn back ready to throw. He said, "Now, God damn you, I have got you," and I fired; shot to defend myself; then went back into the office and put my pistol in my valise, and waited for an officer to come; as soon as the officer came I surrendered myself. At the time I shot, Armstrong was in the act of throwing the brick. I beheved myself to be in great danger. Armstrong was much larger and stronger than I; weighed twenty-five or thirtyfive pounds more than I. I did not snap my pistol; it went off the first time.

There was testimony that the defendant was a peaceable law-abiding man, and that the deceased was a quarrelsome dangerous man; that the parties had had a diffi-

culty the day before, and that the deceased had threatened the life of the defendant.

The first question presented for determination by the record in this case is, whether the following statement in 1. DYLING DECLARA. the dying declaration of Armstrong was admissible in evidence, to-wit: "I believed he (the defendant) was going after his pistol when he went into the office.

* I had seen him at the house

with a pistol before."

While the admission in evidence of the dying declarations of one murdered, is not regarded as an infraction of the constitutional provision that the accused shall be confronted by the witnesses against him, still such declarations are regarded in the light of hearsay testimony, and as admissible only from the necessity of the case and to prevent a failure of justice, and are, therefore, properly restricted to the identification of the prisoner and the deceased, and to the act of killing and the circumstances immediately attending said act and forming a part of the res gestae. This was expressly decided by this court in the case of the State v. Draper, 65 Mo. 335, where the precise point now before the court was carefully considered. Wharton Crim. Ev., § 278; Collins v. Commonwealth, 12 Bush 271; State v. Wood, 53 Vt. 560. As the admissibility of such declarations is not dependent upon the absence of other evidence of the same facts, but is founded upon the presumption that in most cases no other equally satisfactory proof is attainable, neither will the error of admitting any statement beyond the limitations prescribed be cured by reason of the fact that there is other competent evidence of such facts before the jury. 1 Greenleaf's Ev., (14 Ed.) p. 210, note. The first clause of the language of the declarant under consideration, is objectionable because it is a mere matter of opinion, and would have been incompetent if delivered by a living witness under oath. It is material because it impliedly attributes to the defendant a purpose formed, at the time designated, to kill the deceased, and

the taking of the necessary steps to put that purpose into execution, and thus tends to fix the grade of the homicide, not by any statement of facts, but by the expression of a mere opinion. 1 Greenleaf Ev., § 159.

The latter portion of said statement relates to previous events in no way connected with the homicide, and was calculated perhaps to prejudice the jury against the defendant as a man in the habit of carrying deadly weapons, and, therefore, of malevolent disposition. Such statements as this are declared by the authorities to be inadmissible. State v. Draper, supra. We are of opinion, therefore, that the court erred in admitting those portions of his dying declaration to which we have particularly referred.

We are further of opinion that the court properly confined the instructions to the law of murder in the first degree, manslaughter in the fourth degree and the law of self-defense. We have been unable to find anything in this record which would have warranted an instruction for murder in the second degree.

We are of opinion, however, that the court erred in declaring, as it substantially did in the ninth instruction, 2.—. that the jury should give the same force and effect to the dying declarations read before them that that they would had the matters therein stated been testified to before them by Armstrong. This, as was said by Judge Yerger in the case of Lambeth v. State, 23 Miss. 358, is to give to secondary evidence the same weight which is due to direct testimony.

It is true that in some of the authorities the admissibility of dying declarations is put upon the ground that "the persons whose declarations are thus admitted are considered as standing in the same situation as if they were sworn, the danger of impending death being equivalent to the sanction of an oath." 1 Greenleaf Ev., § 157. It is to be remembered, however, in weighing such testimony that feelings of animosity and ill-will once aroused are not always allayed, and that the passion of anger attending the

fatal occurrence itself is not always extinguished even by the consciousness of impending death; and it is also to be remembered that the accused is deprived of all power of cross-examination, "a power quite as essential to the eliciting of all the truth as the obligation of an oath can be." Roscoe's Crim. Ev., 36; 1 Greenleaf Ev., § 162. Besides, such declarations are afflicted with the common infirmity which attaches to all oral statements or verbal admissions, reduced to writing or repeated by another, and are liable to be colored or deflected by the medium through which they are transmitted to the jury.

After reviewing these considerations, Mr. Wharton, in his work on Criminal Evidence, section 276, adds the following just and philosophic observations: "Nor can it always be said that the consciousness of the near approach of death is an equivalent to an oath administered on the witness-stand. A witness sworn in court knows that he may be convicted of perjury if he testifies falsely. A dying man, if he believes in a future retribution, will speak, if his faculties are unimpaired, under a similar sanction; but all dying men do not retain their faculties unimpaired, nor do all dving men believe in a future state of retribution. Convicts on the scaffold have, as a class, as little hope of reprieve as any persons on the eve of death. Yet there is no kind of evidence so unreliable as the last speeches of convicts on the scaffold. The weight, therefore, to be attached to dying deciarations depends upon these considerations: 1. The trustworthiness of the reporters. 2. The capacity of the declarant at the time to remember accurately the past; and 3. His disposition truly to tell what he remembers." We think it quite plain, therefore, that the testimony of a living witness, seen and heard by the jury and cross-examined before them, is entitled to more weight and furnishes a more reliable basis for the verdict of a jury than the reported statements of a dying man whose mental and physical condition at the time they were made could not be observed by the jury, and the accuracy of whose

statements has not been subjected to the crucial test of a cross-examination in court. Such, indeed, was the ruling of this court in the State v. McCanon, 51 Mo. 160, but as no authorities are cited and no satisfactory reasons given for the conclusion announced in that case, we have thought it best to briefly state the grounds of our opinion, inasmuch as the State v. Green, 13 Mo. 382, announces a contrary rule and does not appear to have been brought to the attention of the court in the case of the State v. McCanon. Vide, also, Walker v. State, 37 Texas 365; Lambeth v. State, 23 Miss. 358.

The remaining instructions seem to us to be unobjectionable, and to have fairly presented the case to the jury, with the exception of the third, which is subject to a verbal criticism; the statute declares that a homicide is justifiable when committed in the lawful defense of one's person, when there shall be reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished. The third instruction contains the word "believe" instead of "apprehend," in declaring the law of self-defense. Attention was called to a similar discrepancy in the case of State v. Stein, 79 Mo. 330.

Objection was taken at the trial to certain remarks of the judge, as to the state of the evidence then before the jury, made by him in excluding certain testimony offered by the defendant, which we deem it unnecessary, under the circumstances, to specially notice. The error complained of can be avoided on another trial. Too much care cannot be observed by judges, especially in criminal trials, to abstain from communicating to juries their own impressions of the legal effect of the testimony. The error committed in defining "deliberation" is harmless, as there is no evidence of any "just cause" of provocation, as distinguished from a lawful provocation. State v. Ellis, 74 Mo. 207; State v. Talbott, 73 Mo. 347.

For reasons heretofore given, the judgment of the criminal court will be reversed and the cause remanded. All the judges concur.

THE STATE ex rel. YARNELL, Appellant, v. THE COLE COUNTY COURT.

- 1. The State Lunatic Asylum: PAY PATIENTS: COUNTY PATIENTS. It is not essential to the validity of an order of the county court making a pay patient in the State Lunatic Asylum a county patient, that there should be an express finding that the patient has not sufficient estate to support him; this will be presumed. An order that a patient already in the asylum "became a county patient at the lunatic asylum from this date," without more, will bind the county for his support there.
- ; INQUEST OF LUNACY. The validity of such an order cannot be affected by proof of irregularities in the inquest of lunacy which took place before he was sent to the asylum.
- 3. ——: INSANE POOR CRIMINALS. A citizen of Cole county, confined in the State_Asylum as a county patient of that county, escaped and went to Moniteau county, and there committed a homicide, for which he was tried and acquitted on the ground of insanity, and in accordance with the statute was remanded by the circuit court to the custody of the sheriff, to be held at the expense of the proper county until the county court should cause him to be removed to the asylum. Held, that under the statute, (R. S. 1879, ₹₹ 4153, 4145, 4143,) this man remained the county patient of Cole county; that Cole county was the "proper county" to pay the expenses of his confinement, and that it was the duty of the county court of that county to cause him to be removed to the asylum.

Appeal from Cole Circuit Court.—Hon. E. L. EDWARDS, Judge.

REVERSED.

Draffen & Williams and Jas. E. Hazell for appellant.

J. R. Edwards for respondent.

Norton, J.—It appears from the record in this case that in July, 1880, upon information given to the probate court of Cole county that Z. T. McGirk, then a resident of said county, was insane and incapable of managing his affairs, said McGirk was brought into said court, where, upon an examination had before said court and a jury of six persons, the said jury returned a verdict that said Mc-Girk was of unsound mind and should be confined in an asylum for the insane, whereupon the court appointed George W. McGirk his guardian, by whom he was placed, on the 15th day of July, 1880, in the State Lunatic Asylum at Fulton, as a pay patient. It further appears that said McGirk remained at said asylum till the 23rd day of September, 1880, at which time, being allowed to walk about the grounds unattended, he made his escape therefrom and went to his mother's home in Moniteau county, where, on the 28th day of December, 1880, he killed his brother and guardian, George W. McGirk; that for this offense he was arrested on the same or the next day and was confined in the Moniteau county jail; that he was indicted for the homicide, and on the 12th day of November, 1881, was tried and acquitted on the ground that he was insane. It further appears that the circuit court of Moniteau county, in which the trial was had, after finding that it would be unsafe to permit said McGirk to go at large, and that he was a poor person, ordered that he be remanded to the custody of the sheriff of said county, to be held in safe custody at the expense of the proper county until the county court should cause him to be removed to the lunatic asylum, as in case of other insane poor persons.

It also appears that both the county courts of Moniteau and Cole counties refused to make an order for the removal of said McGirk to the lunatic asylum; whereupon the sheriff of Moniteau county, as relator, instituted this proceeding by mandamus, setting up the above facts, and that said McGirk had, by an order of the county court of

Cole county, been made a county patient, and asking that the county court of Cole county be compelled to make an order for the removal of said McGirk to the asylum. This claim is resisted by the county mainly on the ground that the county court of Moniteau county, the place where the offense was committed and the cause was tried and the defendant acquitted, was the proper county to make the order.

The circuit court ruled in favor of defendant, refused to make the writ peremptory, and from this action of the l. THE STATE LUNA. court the plaintiff has appealed, and assigns for error, among other things, the refusal of the court to receive in evidence the order of the county court of Cole county made in the matter of making McGirk a patient of Cole county in the State Lunatic Asylum, which order is as follows: "Ordered by the court that Z. T. McGirk become a county patient at the lunatic asylum from this date." The date of the above order is August 30th, 1880. It was objected to on the ground that it was a nullity, because the statute was not complied with in making it.

The statute authorizing a pay patient confined in the asylum to be made a county patient, provides as follows: "If the county court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate under seal setting forth that any patient in the asylum has not sufficient estate to support him at the asy-Upon the receipt of such certificate by the superintendent, such person shall be a county patient of such county, and shall be supported by such county, as provided in the cases of poor patients." R. S. 1879, § 4140. As this section conferred jurisdiction upon the county court over the subject matter, and invested it with full power to make a pay patient a county patient, the order made by the court and offered in evidence cannot be said to be a nullity. It may be irregular, but that does not make it void. It is the fact that the pay patient has not estate suf-

ficient to support him at the asylum that authorizes the county court to make him a county patient, to be supported at the expense of the county; and we can indulge the presumption that the court found this fact to exist and based its order upon it. This order, if certified to the superintendent, would be as binding on the county as a certificate of the clerk stating that he had been ordered by the court to certify that such pay patient had not estate sufficient to support him.

The question which this record presents is: Was it, under the facts above stated, the duty of the county court of Cole county to make an order for the removal of said McGirk to the lunatic asylum at Fulton, as in case of insane poor persons? This question, we think, is answered in the affirmative by sections 4153, 4143 and 4145, Revised Statutes. It is provided in section 4153 that "every patient in the asylum shall be deemed to be the county patient of the county first sending him, till one year after his regular discharge from the asylum." Section 4143 provides "that when a person tried upon indictment for any crime or misdemeanor shall be acquitted on the sole ground that he was insane, the fact shall be found by the jury in their verdict, and the prisoner

shall be dealt with as provided in the following sections." One of these sections, 4145, provides "that if the prisoner be a poor person, the court shall make an order remanding him to the custody of the sheriff, or other officer of court, requiring him to hold the prisoner in safe custody at the expense of the proper county, until the county court shall cause him to be removed to the asylum, as in the case of

insane poor persons.".

We think it apparent from the above statutory provisions and the general law regulating asylums, (2 R. S., p. 818,) that it was the intention of the legislature to cast the burden of supporting the insane poor upon each county where such insane poor have acquired a residence or settlement, and that where an insane poor person is sent from a county and is discharged from the asylum, he shall be deemed to be the county patient of such county for the period of twelve months after such discharge, the language of the statute being that every patient in the asylum shall be deemed to be the county patient of the county first sending him till one year after his regular discharge. It seems to have been the purpose of the legislature to provide that before the support of an insane poor person of one county can be shifted to or cast upon another county, such insane person must have ceased to reside in the former county for the period of one year. The same policy has been indicated in the law regulating the support of the poor, (2. R. S., p. 1289, §§ 6579, 6581,) where it is provided that poor persons shall be received, maintained and supported by the county of which they are inhabitants; and that no person shall be deemed an inhabitant, within the meaning of the chapter, who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such person, or who shall have removed from another county for the purpose of imposing the burden of keeping such poor person on the county where he or she last resided for the time aforesaid.

The facts disclosed in the record of this case are, that

The State ex rel. Yarnell v. The Cole County Court.

McGirk was a citizen of Cole county at the time he was put in the asylum on the 15th day of July, 1880; that on the 30th day of August, 1880, he was, by the order of the county court of Cole county, made a county patient; that on the 23rd day of September, 1880, he escaped from the asylum, went to Moniteau county and there remained till the 28th day of December, 1880, when he killed his brother and guardian; that for this offense he was indicted and subsequently acquitted upon the ground that he was insane; that the circuit court of Moniteau county, in which he was tried, found that he was a poor person, and that it would be unsafe to permit him to go at large, and ordered him into the custody of the sheriff, to be kept in safe custody at the expense of the proper county till the county court should order him to be removed to the asylum; that the county court of Cole county refused to make the order for such removal. In the light of these facts and the statutory provisions above quoted, we are of the opinion that the expense incurred in the confinement of said McGirk since the trial and the order of the court remanding him to the custody of the sheriff, is properly chargeable to the county of Cole, and that the county court of Cole county is the proper court to order his removal to the State asylum, as in cases of other insane poor persons.

The judgment of the circuit court will, therefore, be reversed and a judgment entered by this court awarding a peremptory writ of mandamus as prayed for by relator.

All concur.

Moore v. The Grandy Mining and Smelting Company, Appellant.

- 1. Principal and Agent: LIABILITY ON CONTRACT OF AGENT: SEALED INSTRUMENT. Plaintiff sold one Y. a tract of land, the title to which was in doubt. By an instrument under seal, to which defendant was no party and in which he was not named, plaintiff agreed to use diligence in perfecting the title and to have he vested in Y., and thereupon Y. was to pay one-half of the purchase money, the other half being paid in cash. In making the purchase Y. was acting as agent of defendant, and he immediately assigned the contract to defendant, who took possession. Defendant had furnished the money for the cash payment. Plaintiff subsequently aided in perfecting the title, and the same was finally vested in defendant. Held, that though plaintiff could not maintain an action against defendant on the contract, because it was under seal and defendant was no party to it and was not named in 1t, yet he could sue on the implied obligation growing out of all the facts stated.
- Statute of Limitations: PLEADING. When the plaintiff relies on matter in avoidance of a plea of the statute of limitations, he must plead it specially. It will not be received in evidence under a general denial.
- 3. ——: AVOIDANCE OF. To avoid the statute of limitations it is not sufficient to show that the plaintiff was ignorant of his rights until a time within the statutory period. It must appear that his ignorance was caused by some improper act or concealment practiced by the defendant.

Appeal from Jasper Circuit Court.—Hon. Joseph Cravens, Judge.

REVERSED.

Harding & Buler for appellant.

Reynolds & Hilliburton for respondent

Ewing, C.—This suit was commenced January 13th, 1880, by filing a petition in substance: That in 1870 the plaintiff was in possession of forty acres of land in Cherokee county, Kansas; that defendant, by one J. Morris Young, who was defendant's agent and superintendent at Oronogo,

Missouri, applied to plaintiff to purchase his interest in the land, and thereupon plaintiff sold his interest to said Young for \$350, of which amount \$175 was paid, and the other \$175 was to be paid whenever said Young or his assigns should obtain the full title to the land; that the title was in dispute, and consequently it was agreed between said Young and plaintiff that the trade was to be kept secret, and he was to assist said Young in perfecting the title; that the title was finally settled to be in one Joy, and on the 29th day of August, 1870, said Young contracted with said Joy for the legal title, paying \$20 cash, and agreeing to pay the balance in six annual payments; first, January 1st, 1873; and was to receive a deed therefor upon final payment which would be in January, 1879; that said Young all along acted as agent for defendant, who furnished all the money, and that he immediately transferred said contract to defendant, and plaintiff delivered possession of the land to defendant, and defendant has received a deed, and that the balance of the said purchase money "owing to plaintiff is due and unpaid." Therefore he prays judgment for \$175 and interest from August, 1879.

The answer was a general denial and a plea of the statute of limitations, that the suit was not commenced within

five years after the cause of action accrued.

The plaintiff introduced J. Morris Young, who testified in substance that he was superintendent of defendant in 1868 and up to 1878. In 1868 the company wanted to buy some coal land. It ascertained the southeast quarter of the northwest quarter section 14, township 33, range 25, contained coal and was in possession of plaintiff Moore, who had a settler's right thereto. The land was in Kansas. Moore had a cabin and farm and had opened a coal bank; I bought the land from him for the company and took a bond from him, which is as follows:

"Know all men by these presents, that I, B. A. H. Moore, as principal, and Wilson Brayles, his security, acknowledge ourselves to be indebted and justly owe to J.

Morris Young the sum of \$700, for the payment whereof we bind ourselves, etc., etc. June 26th, 1868. Witness our hands and seals, etc. Conditioned that, whereas, said Moore has contracted to sell to J. Morris Young the said land (describing it) for \$350, of which \$175 has been paid, and the remainder is to be paid when the said Moore makes to said Young a title good and sufficient in law to said land; said Young to furnish said Moore with whatever sum of money might be necessary to pay to whoever may under the law be entitled to it. Now, if the said Moore shall execute and deliver a good and valid title to said land to said J. Morris Young, upon his obtaining such a title to the same from the person or persons who will be legally empowered to make such title to him; and also will use all necessary and legal steps, and also use due diligence to and in obtaining such title to said tract of land, then this obligation to be null and void, else to remain in full force and virtue."

I paid \$175 down; when the Granby company got the title the other \$175 was to be paid. I was acting for the Granby company, and assigned the contract to them. Moore helped to get the title. I had some correspondence with Moore, and always referred the letters to the office at St. Louis. I wrote the following letters to Moore:

"ORONOGO, Mo., December 23rd, 1870.

B. A. H. MOORE.

Dear Sir: Your letter of recent date duly received. You will not be required to do anything except to aid us in getting the title to the land. I will want you to go with me to Ft. Scott before very long, to see the railroad company about it. * * Meanwhile all you have to do is to keep still and wait developments, and directions from me." And the next one was to the effect that he had received Moore's letter, referred it to the "head office of the company at St. Louis. * * That Mr. Blow, our president, was absent, and when he returns it would receive the proper consideration."

This letter was dated December 16th, 1874. Moore wrote to me often. I would write to the company putting him off, and tell him it would be fixed all satisfactorily. Moore came to see me in 1879. I wrote the railroad company as to condition of title, and learned then that the land had been deeded to defendant, of which I informed Moore, and this, I think, is the first he knew of defendant having the legal title.

Plaintiff then offered a deed in evidence from the Missouri River, Ft. Scott & Gulf Railroad to defendant for the Moore land, dated September 10th, 1873. Plaintiff then read the deposition of Jno. A. Clark, who said he was land commissioner of the Kansas City, Ft. Scott & Gulf Railroad Company; that he contracted the land to J. Morris Young, and the contract was assigned by him to the Granby Mining & Smelting Company on April 17th, 1871. The contract price was \$5 per acre, \$20 cash, balance in six equal annual installments. The land was deeded to the Granby company September 6th, 1873.

There was judgment for plaintiff, and the case is here

by appeal on the part of the defendant.

The first point insisted on for a reversal is, that the suit is founded upon a contract under seal, between plaintiff and one J. Morris Young, to which defendant was not a party, nor named therein; and it is sought to charge defendant on the ground that Young was its agent. It is a settled principle that when a contract is made under seal no one but a party to the deed is liable to be sued upon it. This is the general rule. Huntington v. Knox, 7 Cush. 374; Story on Agency, § 160; Briggs v. Partridge, 64 N. Y. 357. A contract under seal, made by an agent in his own name, cannot be enforced as the simple contract of the real principal when he shall be discovered. 64 N. Y., supra. But there are exceptions to the rule. In many cases such contract will create an implied obligation on the part of the principal, and entitle him to enforce it against the other contracting party, although the direct remedy for a breach

of the original contract must be against the immediate Story's Agency, §§ 160, 422; Moore v. parties thereto. Hitchcock, 4 Wend. 285. In this case the contract is under seal, signed by the vendor but not by the vendee. The evidence shows that the vendee was the superintendent of the defendant; that immediately after the making of the written contract the vendee assigned the contract to the defendant; that one-half the purchase money was paid down; that plaintiff assisted in procuring the title, as agreed; and that the defendant took and holds possession of the land, and afterward obtained title. The plaintiff does not sue on the written contract; if he did, it could not be maintained; but he sues on the implied obligation arising from the facts in the case, to-wit: the agency, the partial payment, the possession and the title afterward made to the defendant. He sues to recover the balance of the purchase money, on the collateral liability arising on the contract between plaintiff and Young, the defendant's superintendent and agent. This contract is exclusively (in its form, and character and operation) between the plaintiff and Young; and the defendant not being a party to it could not be sued on the contract itself; but the suit is not on the contract; it is upon the implied collateral obligation of the defendant growing out of the contract and facts in the case, to-wit: the agency, the purchase for the use of the principal, the part payment, the possession by the principal and the after-acquired title in the principal—on the other hand, the execution of the contract on the part of the plaintiff, to-wit: the sale, delivery of possession and his assistance in procuring the outstanding title as per the agreement. We, therefore, hold the circuit court did not err in permitting the written contract to be read in evidence.

II. The statute of limitations is insisted on as a bar to plaintiff's recovery. The replication to the plea of the statute simply denied "each and every allegation of new matter therein." The plaintiff, to avoid the bar of the

statute, offered to, and did read the written contract to show the terms of plaintiff's obligation; and other evidence tending to show that plaintiff failed to bring his suit because he was acting under the directions of defendant's agent Young, and awaiting his instructions, and depending on his assurances that it would be made satisfactory, etc., until in 1879, when he first ascertained the defendant had procured the title to the land. The defendant insists that this evidence was not admissible under the replication.

Whenever the plaintiff relies on some special matter in his replication to the plea of the statute, he must plead it. Angell on Lim., §§ 292, 184; Vassault v. Seitz, 31 Cal. 225; Bliss Code Plead., § 393; Clark v. Hougham, 3 Dowl. & Ry. 330; Hubbell v. Fowler, 1 Abb. Pr. (N. S.) 1; 2 Chitty Plead., 435. In this case the replication was not sufficient to authorize the hearing of evidence to the effect, that by the fraud or misconduct of defendant, the running of the statute was suspended. The defendant must have information as to the facts proposed to be set up as a suspension of the statute, and the court erred in admitting this evidence.

III. The court below properly refused the instructions asked by the defendant. They did not present the case to the jury under the evidence; but the instruction given on behalf of the plaintiff was erroneous. The mere fact that the plaintiff had no knowledge or notice that defendant had obtained the title of the land within five years before the commencement of the suit, was no reason why plaintiff should recover. That want of such knowledge must have been caused by the defendant by improper act or concealment, which prevented the plaintiff from commencing this suit. Foley v. Jones, 52 Mo. 64; R. S. 1879, § 3244.

Judgment is therefore reversed and the cause remanded for further hearing. All concur.

NORTON, J., absent.

Vinyard v. St. Louis, Iron Mountain & Southern Railway Company.

VINYARD, Appellant, v. The St. Louis, Iron Mountain & Southern Railway Company.

Railroads: FENCES. A railroad company is not liable for injuries to stock occasioned by defects in a fence which, when erected, was sufficient, unless it knew of such defects, or might have known if it had used due care in maintaining such fence.

Appeal from Jefferson Circuit Court.—Hox. L. F. Dinning, Judge.

AFFIRMED.

Thomas & Vail for appellant.

Smith & Krauthoff with Thomas J. Portis for respondent.

Henry, J.—This is an action commenced by plaintiff in the circuit court of Jefferson county to recover of defendant double damages for the killing of a cow, the property of plaintiff, by a train of defendant's cars. The petition alleged that the cow got upon the track of defendant's road, where it passed through an inclosed field of plaintiff, in consequence of a defective fence which was erected by defendant, and which it was the duty of defendant to maintain, etc.

The evidence disclosed the following facts: At the place where the cow got upon the track, two of the upper planks of a panel of the fence had been sawed off at one end, about two months before the cow was killed, and plaintiff had securely, as he testifies, repaired it, "by nailing a plank perpendicular with and to the post, and nailing the ends of the sawed plank to it." It does not appear that the company had any notice of these facts. Two witnesses for plaintiff testified that they saw this panel of the fence down; one of the witnesses, that he saw it down two days before the cow was killed, and the other, that he saw

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it down the day before the cow was killed, and that it was down two or three days before the cow was killed.

The cause was tried by the court without a jury, and the following declaration of law made by the court is complained of by appellant: "If the defendant had erected and maintained a plank and post fence, at least four and one-half feet high, along and on each side of its railroad, and plaintiff had a field on the east side of said road, and defendant's fence inclosed said field, and a day or two before the cow of plaintiff escaped from plaintiff's field onto defendant's road, and was by its engine and cars run over and killed, some one without the knowledge or consent of defendant had sawed a couple of the planks in said fence, so that they fell down, leaving a gap in said fence, and said cow escaped from said field through said gap, and defendant at the time of said escape and the killing had no notice or knowledge of said gap in the fence, then plaintiff cannot recover unless the court find from the evidence that defendant was guilty of negligence in leaving said gap down, unless defendant willfully killed said cow." Appellant's contention is, that the court should have added to the instruction that defendant was liable although it had no knowledge of the break in the fence, if such time had elapsed after the break as by the exercise of reasonable diligence the break would have been ascertained by defendant.

The instruction might have been more specific, and the court evidently misconceived the evidence. The planks in the fence were sawed about two months, and not a day or two before the cow was killed. The defendant, however, is not liable for injuries to stock occasioned by defects in a fence erected by it, originally sufficient, unless it had notice of the defects, or might have known them if it had used due care in maintaining the fence. This principle announced in Clardy v. Railway Co., 73 Mo. 576, was recognized in the declaration of law made by the court. In that declaration the tendency of the evidence to prove that the panel of the fence was down one or two days before the

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cow was killed, was recognized and the court declared the liability of defendant, if it negligently left the gap down; and having rendered a verdict for defendant, the court must have found that although the fence was down a day or two before the cow was killed, yet it was not negligently left in that condition by the defendant.

The judgment of the circuit court is affirmed. All

concur, except Norton, J., absent.

THE STATE V. GERBER, Appellant

Instructions. Where there is no evidence upon which to base an instruction, it is properly refused.

Appeal from Jefferson Circuit Court.—Hon. J. L. Thomas, Judge.

AFFIRMED.

T. H. McMullin for appellant.

D. H. McIntyre, Attorney General, for the State.

Hough, C. J.—The defendant was indicted in the circuit court of Jefferson county for selling fermented liquors on Sunday. He was tried by the court without the aid of a jury, by consent of parties, and was found guilty and fined. The defendant has appealed, but has filed no brief. No question was made in the court below as to the sufficiency of the indictment, and it is only necessary to say that we regard it as sufficient.

It appears from the record that the defendant, who was a farmer, had wine in his possession which he had made "on the shares," from grapes belonging to one Roe Whitehead; that he had disposed of his own share, but still had Whitehead's share, he having left it with the defendant

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with instructions to sell it for him, or to deliver it to any one whom he might send for it. The prosecuting witness testified that at the request of several youths who were assembled at the house of a friend who was living on a farm which belonged to Roe Whitehead, he went to the house of defendant on Sunday, to obtain a gallon of wine. He told the defendant he had been sent by the boys, giving the names of several, among them the names of two who were nephews of Whitehead. The defendant delivered him a gallon of wine, and the prosecuting witness remarked, as he went to his horse: "The boys will settle for it, with you." The defendant replied "all right," and afterward said: "I don't sell wine on Sunday."

The defendant testified that he delivered the wine "supposing the boys had sent after it with Roe's knowledge." Defendant further testified that he did not sell the wine; that he received no pay, and neither agreed or expected to receive pay for the wine from any one, either for himself or for Whitehead, but gave it to the prosecuting witness, "supposing that he had been sent for it by the boys on Whitehead's farm, with his knowledge."

The court declared the law as follows: "If the court sitting as a jury shall find from the evidence in this cause that defendant, Louis Gerber, in Jefferson county, Missouri, a any time within one year next before the finding of the indictment in this cause, on the first day of the week called Sunday, did sell and dispose of, to Willie Buren, one gallon of wine with the understanding that said wine was to be paid for, then the defendant is guilty of the offense charged in the indictment, and the court should so find."

For defendant the court gave the following: "Under an indictment for unlawfully selling, proof of unlawfully giving away or otherwise disposing of wine on Sunday will not support a conviction."

The following instruction, asked by the defendant, was refused by the court: "If the court sitting as a jury believe from the evidence in this case that the defendant,

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Louis Gerber, a farmer, made wine out of grapes belonging to R. M. Whitehead on shares, and that Whitehead left his part of such wine in Gerber's custody, instructing him to sell the same for him (Whitehead) and to deliver the same to any one he (said Whitehead) might send after it, and that the witness Buren on the Sunday in question came to defendant's after a gallon of wine, and that defendant delivered the same to witness believing him to have been sent for it by said Whitehead, and that defendant took no pay for the same, and made no agreement or contract by which he was to receive pay therefor, then the verdict should be for defendant."

This instruction was properly refused for the reason that there was no testimony upon which to base it. is no testimony whatever that the defendant delivered the wine upon the supposition or belief that Whitehead had sent for it. His own testimony was to the effect that he supposed the boys had sent for it, but with Whitehead's This testimony would not fairly support a knowledge. finding that Whitehead had sent for the wine. That statement is not inconsistent with a sale to the boys; but a delivery of the wine to the messenger of Whitehead, as the instruction puts it, would have been a delivery to Whitehead of what was his own, and of course no sale. The testimony is sufficient to support the finding and judgment of the court, and there being no error in refusing the instruction asked, the judgment will be affirmed. All the judges concur.

The State v. Janson.

THE STATE V. JANSON, Appellant.

- Practice in the Supreme Court. Where the bill of exceptions
 preserves neither the motion for a new trial, nor that in arrest of
 judgment, the Supreme Court cannot take notice of the errors, if
 any, in the progress of the trial.
- 2. An Indictment for obtaining money under false pretenses which set out such pretenses, negatived their truth and further alleged "all of which the defendant then and there well knew," Held, after verdict, not to be obnoxious to the objection that the scienter was not sufficiently averred.
- 3. An Indictment for obtaining money under false pretenses which alleged that defendant had falsely stated that he was about to ship, and had shipped, certain goods, and that upon the faith of the coming thereof he obtained the money in question, Held, not obnoxious to the objection that it set out the representation of a future event merely.

Appeal from Laclede Circuit Court.—Hon. R. W. FYAN, Judge.

AFFIRMED.

Quinn & Bradfield for appellant.

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D. H. McIntyre, Attorney General, for the State.

Philips, C.—The appellant was indicted at the February term of the Laclede circuit court, 1881, for obtaining money from one Conrad Wiessgerder. He was convicted at the same term of court, and sentenced to imprisonment in the penitentiary for the term of two years. From this judgment he has appealed to this court.

As neither the motion for new trial nor in arrest of judgment is preserved in the bill of exceptions, we cannot I. PRACTICE IN THE take notice of any errors, if any, arising in the progress of the trial, but the only errors reviewable in such case are those apparent on the face of the record proper. This has been so repeatedly decided by this court as to require no citation of the cases so holding

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It is claimed by appellant that the indictment is insufficient to support the judgment of conviction, because it 2. AN INDICTMENT. does not affirmatively appear that the defendant knew the alleged false pretenses or representations were false. On examination of the indictment we find, after setting out the pretenses and representations and negativing their truth, the following averment: "All of which the said Andrew Janson then and there well knew." This, we think, was a sufficient averment of the scienter, after verdict, to sustain the indictment in this particular.

It is also alleged against the sufficiency of the indictment, that it avers that the defendant was about to ship the property, on the faith of the coming of which it is alleged he obtained the money in question. It is claimed as this is a future event and not of the past, the law does not make the representation the basis of a prosecution for false pretenses. Conceding this to be the law, as applicable to the facts of this case, it does not invalidat this indictment. The averment in this respect is: "That he, the said Andrew Janson, was about to ship, and had shipped to the railroad company at Lebanon, at the county and State aforesaid, the following personal property," etc; from which it is manifest that the indictment contained, in addition to the averment that he was about to do the act, that "he had shipped," etc. This was sufficient Whether or not the proof sustained this averment could only be brought to our attention by being properly saved in the bill of exceptions. This is not done.

The judgment of the circuit court is, therefore, affirmed. All concur.

Norton, J., absent.

PALMER V. BOORN, Appellant.

Swamp Lands. In the absence of evidence that the Secretary of the Interior has neglected or refused to decide whether a tract of land, in controversy in an action of ejectment, is swamp or overflowed land, or not, within the act of congress of September 28th, 1850, the defendant will not be permitted to show, by parol evidence, that it falls within that act, for the purpose of defeating a title held under the railroad land grant of congress of June 10th, 1852.

Appeal from Livingston Circuit Court.—Hon. E. J. Broaddus, Judge.

AFFIRMED.

John M. Voris and Mead for appellant.

Charles H. Mansur for respondent.

Martin, C.—The plaintiff, on the 18th day of February, 1879, sued in ejectment for the recovery of forty acres of land in Livingston county. The petition was in the usual form, and the answer consisted of a general denial. The evidence produced at the trial is supplied by a statement in the bill of exceptions of its tendency and import.

It is recited that the plaintiff introduced evidence tending to prove a title in himself under the act of congress of June 10th, 1852, granting lands to the State of Missouri for the construction of certain railroads, and the statute of the State of September 20th, 1852, transferring such grant to the Hannibal & St. Joseph Railroad. No patent for these railroad grants was required or contemplated in the acts of congress under which they were made. A descriptive list certified to the State by the Commissioner of the General Land Office, containing the intended lands, together with a map of the definite location of the railroad route, constituted the evidence of title as provided for in the acts of congress. Under the statement of evidence in the bill

of exceptions, it must be assumed that evidence was submitted of such a list, as well as any other evidence required by the acts of congress to perfect the title in the State for railroad purposes. It must be taken that the plaintiff submitted evidence sufficient to make out a prima facie case under the acts of congress. Nothing more than this can be assumed.

To rebut this case the defendant produced oral evidence tending to prove that the land sued for was swamp and overflowed land within the meaning and provisions of the act of congress entitled "An act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits," approved September 28th, 1850, and within the meaning of the acts of the general assembly, granting swamp and overflowed lands to the counties in which they lie, approved March 3rd, 1851, and December 13th, 1855. He offered no evidence of any purchase from the State or county, or of any selection of the land in dispute as swamp land by the Secretary of the Interior, or of any purchase or location from the United States, but relied entirely upon his possessory title and the right incident to it of impeaching the validity of the title asserted against him.

The court, at the instance of the plaintiff, gave the following instruction or declaration of law: "There being no evidence to show that the land in suit has ever been selected as swamp or overflowed land, the evidence offered, tending to prove the said land was swamp or overflowed, does not constitute such an outstanding title as will defeat

the plaintiff's recovery."

The court refused an instruction asked by defendant to the effect that evidence proving that the land was swamp and overflowed excepted it from the railroad grants and left the plaintiff with no title under the railroad acts. Judgment was rendered for plaintiff, and the defendant brings the case before us on appeal.

It will be seen from the foregoing statement that the controversy is between a party claiming title under the rail

road grants, and a party in possession, who, without attempting to make out a title to himself under the swamp land acts, seeks to defeat the suit against him by proving that the land was "swamp and overflowed" within the meaning of said acts, and for that reason exempt from the operation and effect of the railroad acts, being reserved expressly from their operation by the provisions of such acts. It is necessary, therefore, to consider the effect of parol proof of the character of the land, when offered by the defendant in ejectment, not to show title in himself but to defeat the title of the plaintiff.

In the case of Prior v. Lambeth, 78 Mo. 538, it was held, Commissioner Philips rendering the opinion, that when the party plaintiff sues in ejectment claiming title from the State under the swamp land act of September 28th, 1850, it is incumbent on him to prove that the land claimed by him has been selected or designated as swamp land by the Secretary of the Interior, or he must prove a purchase or location which will bring his title within the operation of the confirming acts of March 2nd, 1855, and March 3rd, 1857. In the absence of any aid from the confirming acts, the selection or designation of the tract as swamp land by the Secretary of the Interior is a necessary condition to the investment of the State with a perfect title to it. The doctrine thus announced is in accord with the case of French v. Fyan, 93 U.S. 169, and Stephenson v. Stephenson, 71 Mo. 127.

Although the act provides for the issue of a patent, the title is regarded as vesting absolutely in the State upon the designation or selection of the Secretary of the Interior, since the patent when issued must conform with such selection. Masterson v. Marshall, 65 Mo. 94; Smith v. Goodell, 66 Ill. 450; Bristol v. Carroll Co., 95 Ill. 84. But when the provisions of the swamp land act of 1850 are invoked by the defendant in an action of ejectment for the purpose of defeating a title derived under the railroad acts, does the same rule apply? Is it necessary for him to prove that the

tract has been selected as swamp land by the secretary, or will he be permitted to prove its character by parol evidence? I propose to consider this question briefly under the authorities, which are somewhat conflicting.

In the case of Railroad Co. v. Smith, 41 Mo. 310, the plaintiff, as in this case, made out a prima facie title under the railroad grants of congress. The defendant sought to impeach that title by parol proof of the character of the land, and the court, after a very able and exhaustive review of the whole subject, reached the conclusion that such evidence was admissible. The learned judge rendering the opinion conceded that such evidence would not be admissible to sustain or establish a swamp land title in the plaintiff asserting it in an action of ejectment. But he held it admissible to defeat a title under the railroad grants, when submitted by a defendant in ejectment. The ground upon which this distinction was placed was that if the land was swamp and overflowed, then it was by the provisions of the railroad grants excepted from their operation and effect; in other words, it was reserved by the government for other purposes, and the officers of the land department had no authority to grant or convey it to railroads or to any one else.

The case was taken by writ of error to the Supreme Court of the United States, where it was affirmed. Railroad Co. v. Smith, 9 Wall. 95. The fact of affirmance was accepted in some cases as an approval of the principle announced in the decision without qualification or limitation of any kind whatever. Clarkson v. Buchanan, 53 Mo. 563; Campbell v. Wortman, 58 Mo. 258; Railroad Co. v. Snead, 65 Mo. 239; Funkhouser v. Peck, 67 Mo. 19 But an examination of the statement and opinion in the case as reported in the federal court, shows that the principle announced below was accepted with a very important qualification. In his statement of the case the reporter says: "No evidence was introduced by him (defendant) tending to show that the land in suit was ever certified as swamp land by the

Secretary of the Interior, or that the same was ever patented as such to the State of Missouri. Nor was this pretended. In fact, the correspondence of the land department of the United States showed that the secretary had no sufficient evidence to enable him to make such certificates." 9 Wall. 96.

The decision of the court was placed expressly upon the ground of the failure or neglect of the Secretary of the Interior to decide what was and what was not swamp land. It appeared from the evidence in the case that the secretary had not acted at all, although many years had passed since the duty of acting had been imposed on him. The import of the decision was, that parol evidence was admissible to show the character of the land when it appeared that the character had not been determined by the action of the secretary; otherwise the State might be deprived of the bounty of the general government by the neglect of its officers to do their duty. The reasoning to support the conclusion of the court I conceive to be somewhat unsound. but I have no occasion to consider it here. Justice Clifford dissented from the opinion of the court, maintaining that the power to designate the character of the lands was vested solely in the Secretary of the Interior, and that no court or jury was empowered under the act to make the required lists and plats or to determine what should be included in them; the right to do this was not vested in them by the neglect of the secretary. The learned judge went further than any court has yet gone, and held that the title did not vest in the state till the list of the secretary was followed by a patent.

This same question about the admissibility of parol testimony, came again before the Supreme court of the United States in French v. Fyan, 93 U. S. 169. The plaintiff sought to impeach the validity of a patent issued to the State of Missouri, under the swamp land act of 1850, by proving that it was not swamp or overflowed land, and in support of his position cited the case of Railroad Co. v.

Smith, 9 Wall. 169. His right to such evidence was very pointedly denied by the court, whose opinion was rendered by the same distinguished jurist giving the opinion in the case cited by the plaintiff, who undertook to explain the meaning and import of that decision. He remarks: "The admission (of parol evidence) was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act." In concluding his opinion he adds that "if in that case the secretary had made any decision the evidence would have been excluded." The principle laid down in French v. Fyan is, that the right to determine the character of the lands belongs to the Secretary of the Interior, and that his action, whether evidenced by a certified list or by a patent, is conclusive on every one in an action of ejectment.

This principle, as applying to a defendant in ejectment, has been approved by our Supreme Court in Birch v. Gillis, 67 Mo. 102. In the latter case the defendant was seeking to defeat a patent given to a purchaser subsequent to the act of 1850, by proving that the land was swamp and overflowed land within the meaning of the act, and therefore not subject to sale or pre-emption in 1859. The court held that parol evidence was not sufficient to establish the character of the land, and that evidence of its selection by the Secretary of the Interior was necessary. The only departure from this principle approved by the court to whom belongs the duty of determining finally these questions under the acts of congress, is made to depend upon the neg lect or refusal of the Secretary of the Interior to make out and certify the lists indicating the character of the lands. Railroad Co. v. Smith, 9 Wall. 169.

It is true that in French v. Fyon and Birch v. Gillis, the parol testimony held to be inadmissible was invoked to defeat the validity of patents. But there is no distinction in principle as to the impropriety of admitting parol testi-

mony to defeat the effect of the certified lists of railroad grants, any more than to defeat the effect of patents issued in pursuance of law; and in the case of French v. Fyan, no distinction was pretended. See also Campbell v. Wortman, 58 Mo. 258. In Railroad Co. v. Smith, 41 Mo., the court admitted parol evidence for the purpose of proving that the lands contained in the railroad lists had been reserved by congress for other purposes. It was claimed that this could be done by proof of the character of the lands. But if the lands were reserved from sale, then patents equally with certified lists would be null and void.

In the language of a recent case "a patent may be collaterally impeached in any action and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others." Smelting Co. v. Kemp, 104 U. S. 646. Parol evidence is admissible to show this, when that kind of evidence is contemplated or provided for in the acts of congress which assume to confer Sherman v. Buick, 93 U. S. 209; Morton v. Nebraska, 21 Wall. 660. No officer of the government has the right to give a patent or certificate of transfer to any land reserved by congress from sale. While the title remains reserved still in the government, it requires an act of congress to take it out and give it to another. State v. Ham, 19 Mo. 602. After congress has made transfer of it the title is equally beyond the power of congress, as well as the department officers, to transfer it to another. The fact that under the act of congress it is provided that the Commissioner of the General Land Office shall not include the swamp and overflowed lands in his certificates of railroad lands, and that his certificates to the railroads of such lands should be null and void, adds nothing to the force of the argument in favor of admitting parol evidence. The swamp and overflowed lands having been reserved from sale, any

certificates or patents of sale would be void without such provision or declaration.

The question in this case concerns the admission of parol evidence to determine the truth of a fact committed by the act of congress to the Secretary of the Interior. The 2nd section of the act of 1850 provides "that it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the state." The 3rd section provides "that in making out a list and plats of the lands aforesaid, all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom." If the Secretary of the Interior has acted in the matters here committed to him, is not his action conclusive in an action at law upon all persons? Can the verdict of a jury be substituted for these lists and plats? According to the accepted doctrine of the most recent cases his action is conclusive and binding on all parties. French v. Fyan, 93 U. S. 169; Bristol v. Carroll Co., 95 Ill. 84; Hendry v. Willis, 33 Ark. 833; Cahn v. Barnes, 7 Sawyer C. C. 48; Birch v. Gillis, 67 Mo. 102.

Over thirty years have elapsed since the duty of making out these lists and plats was imposed on the secretary, and in the absence of proof to the contrary, it must be presumed that he has acted and discharged his duty. When at this late day the defendant insists on submitting parol evidence of the character of the lands under the act of 1850, what will that evidence avail him? If the secretary has acted, his action concludes him. The secretary's list is the best evidence of the character of the lands. And if he seeks to submit other evidence rising from the necessities of the case, as permitted in Railroad Co. v. Smith, 9 Wall. 95, it is incumbent on him to rebut the presumption of the existence of the primary evidence in the action of the sec-

retary by showing that he has neglected or arbitrarily refused to act at all; the foundation being laid for the admission of secondary evidence, he will, under the authority of the case last cited, be permitted to prove by parol testimony the character of the lands, which will, for his protection, stand in the place of the decision of the secretary until that decision is made. The recent case of *Iowa Railroad Land Co. v. Antoine*, 52 Iowa 429, is in all respects similar to the one we are now considering. In that case it was held that parol evidence was not admissible to impeach a title under the railroad acts, by proof that the lands were in fact swamp and overflowed lands; the court held it incompetent in an action at law.

This principle is applicable to defendant as well as plaintiff in actions of ejectment. The purchasers from the railroads hold under the acts of congress, and their titles thus acquired in good faith in every portion of the State, should be protected by the same rules of evidence which protect other titles and rights. There is neither law nor policy in permitting their titles to be overthrown at the behest of every squatter who feels able to persuade a jury that the land in controversy was wet and unfit for cultivation thirty-four years ago. As the defendant in this case offered parol testimony as to the character of the land, without pretending to account for the absence or non-existence of the evidence provided by the acts of congress in the decision of the Secretary of the Interior, his testimony was properly held to be insufficient and incompetent to establish the character of the land, so as to defeat the title of the plaintiff.

All concurring, the judgment is affirmed. Norton, J., absent.

The State v. Cleveland.

THE STATE, Appellant, v. CLEVELAND.

- Embezzlement by Township Trustee. Section 41 of article 3 chapter 42 of Wagner's Statutes, providing for the punishment of officers converting to their own use the public money, embraces township trustees.
- 2. ——: TOWNSHIP ORGANIZATION: JUDICIAL NOTICE: INDICTMENT. Judicial notice is not taken of the fact that a county has adopted township organization. Unless such be the fact, there is no such office as that of township trustee. It is, therefore, essential that such fact be alleged in an indictment under section 41 of article 3, chapter 42 of Wagner's Statutes, against a township trustee for converting to his own use the public moneys of the township. See City of Hopkins v. Railway Co., 79 Mo. 98.

Appeal from Harrison Circuit Court.—Hon. S. A. RICHARDSON, Judge.

AFFIRMED.

D. H. McIntyre, Attorney General, for the State.

Shanklin, Low & McDougal with J.W. Alexander and W. H. Skinner for respondent.

Henry, J.—Defendant was indicted at the March term, 1880, of the circuit court of Harrison county. The indictment contains two counts, but, owing to its length, we only incorporate that portion which presents the question we deem it necessary to notice. Omitting the formal parts the first count charges: "That Samuel R. Cleveland, on the 5th day of March, 1877, being then and there an officer duly elected and qualified under the laws of the State of Missouri, to-wit, being the township trustee of Clay township, it being also known as township sixty-six and sixty-seven, in Harrison county and State of Missouri, *

* did unlawfully, feloniously, etc., embezzle and convert to his own use," etc. The other count contains the same averment. A demurrer to the indictment was interposed by defendant, which was sustained and judgment

The State v. Cleveland.

rendered accordingly, from which the State has prosecuted this appeal.

Section 41, Wagner's Statutes, 459, on which the indictment was based, provides that: "If any officer, ap
1. EMBEZZLEMENT pointed or elected by virtue of the consti
TRUSTEE. tution of this State, or any law thereof, including as well all officers, agents and servants of incorporated towns and cities, as of the State and counties thereof, shall convert to his own use * *." It is contended by respondent's counsel that this section does not embrace township trustees; but on this point it is sufficient to say that in the case of State v. Hays, 78 Mo. 600, the contrary was expressly decided.

Another, and we think a fatal objection to the indictment is, that it does not allege that township organization 2 : township had been adopted in Harrison county. In cial notice: indict- the State v. Bench, 68 Mo. 79, it was held that courts cannot take judicial notice of the fact that a county has adopted township organization. If Harrison county, in pursuance of the Township Organization Act, had adopted township organization, then, under the law, there was such an office as township trustee. Otherwise, there was no such office within that county. It is essential that an indictment against an officer, under that section, should distinctly state such facts as will show the existence of the office, unless it be one of which the court will take judicial notice of its existence within the territory in which the party indicted is alleged to have been elected. The fact that the county was under township organization was a material fact, and every material fact of which the court will not take judicial notice must be alleged. In the State v. Hays, supra, that fact was alleged.

The judgment is affirmed.

The State v. Lewis.

THE STATE V. LEWIS, Appellant.

- Homicide: EVIDENCE. On a trial for murder the State gave evidence that the defendant attempted to cut the deceased (his wife) with a knife during the night preceding the day of the homicide, and further showed, against the objection of defendant, that on the morning of the homicide the deceased exhibited a cut in her dress to a witness, and that the cut had the appearance of having been made with a knife. Held, that there was no error in admitting this latter evidence.
- 2. Witness: EVIDENCE OF CONVICTION. When parol evidence is objected to, the record must be produced to prove the conviction of a witness. Another witness will not be allowed to testify that he saw the first in the penitentiary as a convict. This is true equally whether the testimony is offered to affect his competency or his credibility.
- Prisoner's Absence from Motion for New Trial. Unless it
 appears from the record affirmatively that the prisoner was denied
 the right or privilege of being present when his motion for new trial
 was argued and determined, his absence will be no ground for reversal.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

C. O. Bishop with Smith & Krauthoff for appellant.

D. H. McIntyre, Attorney General, for the State.

Hough, C. J.—We have examined the record in this case, in connection with the opinion of the court of appeals, with the care due to a case upon the determination of which depends the continuance of a human life. It is the third time this case has been before us on an appeal by the defendant, in each instance from a judgment of the criminal court of St. Louis, condemning him to be hanged for having murdered his wife on the 13th day of October, 1876. It is unnecessary to state the facts; they are sufficiently presented in the opinion of the St. Louis court of appeals and clearly establish the guilt of the defendant. The pro-

The State v. Lewis.

ceedings on the trial now brought before us for review, appear to be formal and regular, and the opinion of the court of appeals satisfactorily disposes of all the questions presented in the earnest and ingenious argument of defendant's counsel, save three, which were doubtless not specially brought to the attention of the court of appeals.

It appears from the evidence that the defendant attempted to cut the deceased with a knife during the night 1. HOMICIDE: evidence. preceding the evening on which he murdence. dered her; and on the morning of the day on which she was killed, the deceased went into the room of an acquaintance near by and exhibited a cut in her dress, near the left thigh. This person testified to seeing the deceased, at the time stated, with a dress on which had the appearance of having been cut with a knife. What the deceased said at that time was excluded by the court; what the witness saw was admitted, and we think properly. The defendant could not be connected with the cut in the dress by the statements of the deceased; but it would have been competent to connect him therewith by other evidence, direct or circumstantial. Messner v. People, 45 N. Y. 1.

One William Bell, a witness for the State, was asked on cross-examination, whether he had not been convicted 2. WITNESS: evidence of grand larceny and sent to the penitentiary, and he answered in the negative. The defendant afterward offered to prove by one Tom Williams that he had seen William Bell in the penitentiary at Jefferson City as a convict. This testimony was objected to and excluded by the court, and rightly so on the authority of the State v. Rugan, 68 Mo. 214, which declares the record of conviction to be the best evidence and the only evidence which can be received when oral testimony is objected to; and we regard it as wholly immaterial whether the purpose be to effect the competency or the credibility of the witness; in either case the record must be produced if objection be made to oral testimony of the fact.

The last point urged here, in addition to those made

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before the court of appeals, is, that the record does not some not sense not show that the defendant was present when the notion for a new trial was argued and decided. The record is silent on that subject, and as it does not, therefore, affirmatively appear, as in the case of the State v. Hoffman, 78 Mo. 256, that the defendant was denied the right or privilege of being present when the motion was heard and determined, this objection is unavailing. R. S., § 1891.

We are all of opinion that the defendant has had a fair trial, and having been justly and legally convicted of a most brutal murder, we affirm the judgment of the court of appeals.

HALEY V. THE HANNIBAL & St. Joseph Railroad Company, Appellant.

Garnishment: SERVICE ON BAILBOAD COMPANIES. To make a valid garnishment of a railroad company under the proviso to section 2521, Revised Statutes 1879, the notice must be delivered to "the nearest station or freight agent" of the company, and the officer's return must so describe the person to whom it is delivered. A return describing him as the "nearest agent" is insufficient. See Norvell v. Porter, 62 Mo. 309.

Appeal from Jackson Circuit Court.—Hon. S. H. Woodson, Judge.

REVERSED.

G. W. Easley for appellant.

Henry Smith and W. H. Watts for respondent.

Norton, J.—John J. Haley began an action by attachment against Patrick Hubbard before a justice of the peace

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in Kansas City. The constable executed the writ, and returned that Patrick Hubbard could not be found and that he garnished the appellant "by delivering a copy of the notice to D. W. Steal, nearest agent of the Hannibal & St. Joseph Railroad Company."

The garnishee answered, stating that at the time of the service of the garnishment on the 23rd day of July, 1879, it owed Hubbard \$21.87 wages as laborer from June 1st to June 30th, 1879; that the agent on whom the notice of garnishment was served, sent the notice to the general attorney of appellant at Hannibal, who received the same on the morning of July 24th, 1879, and immediately telegraphed the treasurer of the company, who was then out on the road paying its employes wages for June, 1879, but before the receipt of said telegram, the treasurer paid said wages to Hubbard. The answer further showed that Hubbard quit the service of the defendant on or about the 1st day of July, 1879.

A judgment was rendered against the garnishee by the justice, and an appeal was taken to the circuit court. On the trial anew in the circuit court, the plaintiff admitted that the matters and things stated in the amended answer of the garnishee were true as therein stated, and the said amended answer was then read in evidence. The garnishee then admitted that at the time of the service of the notice of garnishment in this case, Patrick Hubbard was a non-resident of this State. On the trial in the circuit court, plaintiff obtained judgment, from which the defendant has appealed.

It is conceded by counsel for plaintiff that the appeal involves nothing more than a construction of sections 2521 and 2519 of Revised Statutes. Section 2521 is as follows: "Notice of garnishment shall be served on a corporation in writing by delivering such notice, or a copy thereof, to the president, secretary, treasurer, cashier or other chief or managing officer of such corporation; provided such notice may be served on railroad corporations by delivering the

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same, or a copy thereof, to the nearest station or freight agent of such corporation in the county in which the cause of action is pending." When service is made under the above section on an agent of a railroad corporation, other than the president, secretary, treasurer, cashier or other chief or managing officer of such corporation, the agent served with the notice must not only be a station or freight agent, but he must be the nearest station or freight agent of the corporation in the county where the cause of action is pending. Testing the service in this case by the rule laid down in the above section it must be held to be insufficient, it not appearing on the return of the officer that the agent upon whom service was had, was either a station or freight agent. It is the notice of garnishment served as the statute provides that fixes the liability of the garnishee. R. S., § 2520. A garnishee, by voluntary appearance or waiver of notice, cannot give jurisdiction so as to affect third parties. "Garnishment rests wholly on judicial process and depends upon the due pursuit of the steps prescribed by law for its enforcement. It can borrow no aid from volunteered acts of the garnishee. Such acts will be regarded as void so far as they interfere with the rights of third parties." Drake on Attachment, § 451 b.

As the liability of a garnishee attaches only when notice of garnishment is served upon him as prescribed by law, and as the service of notice in this case does not comply with the requirement of the statute, the defendant was justified in paying to Hubbard, the defendant in the attach-

ment proceeding, the wages due him.

It is unnecessary to enter upon the construction of section 2519, Revised Statutes, as the view above taken is decisive of the case, and necessarily leads to a reversal of the judgment.

Judgment reversed, all concurring.

Roberts v. Jeffries,

Roberts v. Jeffries et al.; Inge's Administrator, Appellant.

Joint Debtors: SURETYSHIP: SUBROGATION. Where one of three joint debtors gave security to another by way of indemnity against the debt; Held, that the third, who stood in the relation of surety to both, had no right to insist that the security should be exhausted before the creditor proceeded against him; (1) Because his only right in respect of the security was to be subrogated to its benefits, and this would not arise until he had paid the debt; (2) Because co-promisors cannot, by arrangements between themselves, hinder and delay their creditor in the collection of his demand.

Appeal from Franklin Circuit Court.—Hon. A. J. Seay, Judge.

AFFIRMED.

T. A. Lowe for appellant.

Crews & Booth and Thos. B. Crews for respondent.

Henry, J.—This is a suit on a note executed by the defendants Jeffries and J. N. Inge, dated 13th day of October, 1869, for \$2,640, payable to plaintiff, twelve months after its date.

After the institution of the suit in the Franklin circuit court, the defendant Inge died, and Webb, as administrator of his estate, filed his separate answer to the petition, in which he admitted the execution of the note by his intestate, but alleged that Charles R. Jeffries was the principal in the note, and that Inge and C. S. Jeffries signed it as sureties, and that Inge did so at the special instance of the other payors, who agreed with him that they would hold him harmless, and that if C. R. Jeffries failed to pay the note at maturity, C. S. Jeffries would pay it; that said C. R. Jeffries then owned about 300 acres of land in Franklin county, worth more than double the amount of the note; that afterward, on the 15th day of November, 1871, said C.

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R. and C. S. Jeffries, contriving to obtain an advantage over said Inge and to hold said C. S. harmless, contrived and confederated together to place all of C. R.'s real estate in said county at the disposal and control of C. S., and accordingly said C. R. executed and delivered to one E. II. Jeffries a deed of trust, conveying all of his most valuable lands in Franklin county, to secure a note for \$200, executed by C. R. and payable to C. S. Jeffries, dated December 5th, 1868, and to secure said C. S. Jeffries against his liability on the note in suit; that immediately after the execution of said deed of trust the beneficiary, C. S. Jeffries, took possession of part of the land, worth \$250 per annum, and has ever since continued in possession; that the plaintiff had notice of all of said facts and acquiesced in and sanctioned the same, and has extended the time of payment of said note without the consent of Inge, and prays that E. H. Jeffries be brought into court and required to execute said deed of trust, and to restrain the collection of any judgment that plaintiff may obtain in this action against defendant Webb, as administrator, and all process and pleading against the property of the estate of Inge. The court sustained a demurrer to the answer of Inge, and rendered a judgment accordingly, from which this appeal is prosecuted.

In some respects, this is a remarkable answer. It alleges fraud in general terms, but not one specific act of fraud is charged, and the specific acts which are alleged show that, so far from defrauding Inge, the transaction complained of actually secured him against any loss whatever in consequence of having signed the note. The deed of trust not only secured C. S. Jeffries, but, in equity, inured equally to the benefit of Inge, and if by the agreement between him and the Jeffries, he was surety for both, and they were to indemnify him, this deed of trust fully accomplished that object. "The right of subrogation, (and that is the only right Inge's administrator has,) rests upon principles of equity," and it "does not arise in favor of a surety

until he has actually paid the debt for which he is liable as surety." Sheldon on Subrogation, §§ 87, 127. One surety has no concern with the property conveyed to a cosurety for his indemnity until the former has paid the debt, except, perhaps, in certain contingencies, he might in equity restrain his co-surety from a threatened or reasonably apprehended destruction or waste of the property by his cosurety. But he cannot incumber and embarrass a suit of the creditor to recover his debt, with collateral issues in which he has no interest whatever. It would be injecting one suit into another, the party plaintiff in the original suit having no connection with the subject matter of the injected suit. C. S. Jeffries could not in this suit, if the trustee in his deed of trust should refuse to act, obtain the relief Inge's administrator asks, and he certainly has no greater rights in the matter than C. S. Jeffries has. In fact all the rights he can ever have under the deed of trust, he will derive from him, and he can have none until he has paid the debt. Co-promisors cannot, by arrangements between themselves, hinder and delay the creditor in the collection of his demand.

The judgment is affirmed. All concur.

THE STATE ex rel. THE ATTORNEY GENERAL V. THE MISSOURI PACIFIC RAILWAY COMPANY.

Railroad: CHANGE OF GAUGE AND ROUTE. The return to an alternative writ of mandamus requiring a railroad company to re-lay a certain portion of its road, which it had torn up and dismantled, and to reequip, maintain and operate the same as a narrow-gauge railroad, showed in substance, that the respondent company had been formed by consolidation of several other companies; that it had acquired the portion of road in question (at the time a narrow-gauge) from one of these companies, and with it the rights, privileges and immunities secured by the charter of said company, among which was the power and right at any time to alter and change its road-bed,

or any part thereof; that because the bridges, iron and ties on the road acquired from said company had become worn out, dangerous and unfit for use, and for other considerations relating to the business of respondent and the convenience and safety of the public, respondent, in pursuance of authority derived from the public statutes of the State and a vote of more than two-thirds of its board of directors, had determined to change the whole of said road (of which the portion of road in question was but a part) to a standard gauge road: that respondent had actually made and completed this change on all of said road except the portion in question, and on that portion, for purposes of economy, convenience and safety, had caused a new route to be surveyed, and was proceeding with all reasonable dispatch to construct said changed line, and had provided the materials and equipments necessary for the operation of the same as a standard gauge road, and expected to complete the same within four months, which was as soon as it could be done with due and proper consideration of respondent's other business, economy, efficiency and the safety and convenience of the public; that respondent was in the meantime furnishing to the public all needed facilities in conveying persons and property between the termini of said dismantled line; that all of respondent's other lines were of the standard gauge, and that it was wholly impracticable successfully, efficiently and economically to maintain and operate the portion of road in question in connection with the rest as a narrowgauge. Held, that this return was good on demurrer.

Original Mandamus.

Bryant, Holmes & Waddill and Southern & Staley for relator.

Thomas J. Portis and J. L. Smith for respondent.

Sherwood, J.—The return to the alternative writ of mandamus issued by this court, is as follows:

Respondent, for answer to the amended alternative writ of mandamus filed herein, admits the incorporation of the said several railroad companies as alleged in the said amended writ; that the respondent is a consolidated railroad corporation, organized under the statutes of the State of Missouri, at the time and in the manner in the said amended writ stated; that at the time in said amended writ stated, respondent did tear up and destroy said narrow-

gauge railroad track, and did remove the rails therefrom, and did remove all rolling stock from said narrow-gauge railroad as charged in said amended writ; that respondent has, ever since the tearing up and dismantling of said narrow-gauge railroad between Kansas City and the city of Independence, wholly failed and refused, and now refuses, to restore, maintain and operate said railway between the two said last named cities as a narrow-gauge railroad as is

alleged in said amended writ.

First, Respondent, for its further answer to the allegations in said amended writ contained, and as an excuse and justification for tearing up, dismantling and discontinuing the said narrow-gauge railroad as such, states that it acquired said narrow-gauge railroad, extending from the city of Lexington, in the county of Lafayette, through the city of Independence, to Kansas City, in the State of Missouri, a distance of forty-three miles, with all the rights, privileges and immunities secured it by its charter and the laws of the State, among which was and is the power and right to alter and change at any time, its whole road-bed or road line, or any part thereof, subject alone to the restrictions and limitations imposed by the public statutes of the State; that in pursuance of the power and authority vested in it by the public statutes of this State, and a vote of more than two-thirds of its board of directors, taken and recorded on the 9th day of November, 1881, and because the respondent, prior to the day and year last aforesaid, ascertained through its engineers and other officers, that the bridges on said narrow-gauge line of railroad across the Big Blue, Rock Creek and other streams and rivers, were decayed and rotten, insecure and unfit for use and dangerous; that the cross-ties on said railroad were decayed, rotten and worthless: that the iron rails on said road were much worn, insecure and unsafe; that the road-bed was greatly out of repair; that said narrow-gauge railroad, in its then condition, could not be operated without great danger to the public; and because further, of respondent's largely in-

creased and constantly increasing business and for the greater safety and convenience of the public in the conveyance of persons and property not only over that portion of said narrow-gauge railroad between Independence and Kansas City, a distance of ten miles, but over the entire line of said narrow-gauge railroad from the said City of Kansas to the city of Lexington, a distance of forty-three miles, the respondent determined to change the gauge of said entire line of road from a narrow-gauge to a standard gauge railroad, and that in pursuance to its said legal rights, and in obedience to said demands of its business, and for greater economy and efficiency, and greater safety and convenience of the public in the conveyance of persons and property as aforesaid, had actually made such change in said narrowgauge railroad between Lexington and Independence before the commencement of these proceedings, and is now proceeding to make such change in the road-bed of said narrow-gauge road between Independence and Kansas Citythe change of gauge in that part of said narrow-gauge road between Lexington and Independence is already complete and also to make such change in the road-bed and road line of said part of said narrow-gauge road as will both shorten said part of said line and at the same time overcome and avoid such natural objections and obstacles as heavy grades existing on said line, and the construction of two expensive bridges over streams across which respondent already had and has constructed safe and substantial bridges, and to that end and for that purpose has caused that part of said narrow-gauge railroad between the city of Independence and Kansas City to be taken up and its road-bed and road line to be surveyed and changed, so as to substantially accomplish said results without transcending the restrictions and limitations imposed by statute in the exercise of said right as aforesaid. The map hereto attached and made a part of this answer, indicates and shows the manner and extent of said change of said narrow-gauge railroad as accurately and as precisely as the same can be done, and

is in accordance with the vote of its said board of directors.

Second, Respondent further answering said amended writ states that it is proceeding with all reasonable dispatch to construct said changed railroad and road line as in the manner aforesaid; that it has purchased the materials for that purpose; that the cross-ties and iron have been purchased, a part of which has been received and laid down on said line for a distance of five miles or thereabouts; that the rolling stock and equipments for the operation of said railroad as a standard gauge railroad on said changed line have been procured; that it will complete and operate the whole of said railroad within the next four months, as it is advised, which is as soon as it can be done with due and proper consideration for its other business, economy, efficiency and the safety and convenience of the public.

Third, Respondent for its further answer to the said amended writ, and as further justification for said action respecting said narrow-gauge railroad, avers that during all the time since its said consolidations have been made, and since the said changes of the gauge and road-bed and road line of said narrow-gauge road have been in progress, it has not failed to furnish all the facilities, accommodations and conveniences in conveying passengers and property between the said cities which have been demanded or needed by the public, and that it now is fully able and ready and willing to furnish the same, and that the public has not and cannot suffer any detriment or inconvenience by reason of the time which has been and will be required in effecting and completing said change of road-bed and line of said narrow-gauge railroad, and which respondent avers is not and will not be unreasonable under the circumstances hereinbefore alleged.

Fourth, Respondent for its further answer to the said amended writ, and as further justification and excuse for its said action therein alleged, states that all its other lines of road are standard gauge, and that it is wholly impracti-

cable to maintain and operate successfully, efficiently and economically, in connection with the other parts of its continuous standard gauge roads, a link of ten miles of narrow-gauge railroad between Kansas City and Independence, and that respondent is now proceeding to change said narrow-gauge road between said city of Independence and Kansas City, in the manner hereinbefore stated, so that when the same is complete there will be substantially and practically a double track of standard gauge railroad between the said cities, which will be of great public utility.

Fifth, Respondent further answering denies that the law of the land, or the provisions of its charter, or the charter of any of said railroad corporations mentioned in the said amended writ, impose upon respondent the several duties and obligations with respect to the restoring, maintaining and operating said narrow-gauge railroad alleged in said writ; and respondent denies each and every allegation in said writ contained not hereinbefore specifically admitted. And now having fully answered, respond-

ent prays to be discharged with its costs.

The sufficiency of this return is questioned by the demurrer of the relator upon the following grounds:

T.

He demurs to the first defense of new matter contained in respondent's return to the amended alternative writ of mandamus herein, for the reasons following: 1st, It does not state facts sufficient to constitute a defense to this action. 2nd, It does not aver that the change in the roadbed and road-line of said narrow-gauge railroad therein mentioned, was made by or pursuant to a two-thirds vote of the board of directors of respondent, or of any of the railroad corporations forming either or any of said consolidated corporations. 3rd, The proposed change in said road-bed and road line are not shown nor indicated by said return and map, either separately or taken together, with sufficient definiteness or precision to enable the court to

ascertain and determine what such changes are, and whether the proposed changes are such as are authorized by law. 4th, It does not sufficiently appear that the proposed change in said road-bed and road line was made for the purpose of shortening the line or to overcome any natural objection thereto, or to secure economy in its construction. 5th, Taken in connection with the admissions in said return, it shows that nothing whatever toward restoring said destroyed and dismantled road had been done or attempted prior to the commencement of these proceedings, and that a reasonable time for restoring the same had long since elapsed.

II.

He demurs to the second defense of new matter contained in said return for the following reasons: 1st, It does not state facts sufficient to constitute a defense to this action. 2nd, Taken in connection with the admissions contained in said return, it shows that a reasonable time for the building and restoration of said road had elapsed long before the commencement of this action. 3rd, It is immaterial that, at the time of making said return, respondent was or is now proceeding to perform the duty commanded by the amended alternative writ. The return ought to show either actual obedience to the mandate of that writ or else that, within a reasonable time after said road was torn up and dismantled, respondent had commenced the restoration and re-building of the same, had continuously prosecuted the work with all reasonable diligence and dispatch, and a reasonable time to restore and re-build the same had not elapsed.

III.

He demurs to the third defense of new matter contained in said return for the following reasons: 1st, It does not state facts sufficient to constitute a defense to this action. 2nd, It does not show that all the facilities, accommodations and conveniences in conveying passengers and

property between the cities of Independence and Kansas City which have been demanded or needed by the public have been furnished by the respondent in any manner whatever. 3rd, It does not show that any such facilities, accommodations or conveniences whatever have been furnished along the line of said narrow-gauge railroad in any manner whatever. 4th, It is immaterial that equal conveniences have been or may be furnished for such purposes by the respondent over some other line of railway.

IV.

He demurs to the fourth defense of new matter in said return contained for the following reasons: 1st, It does not state facts sufficient to constitute a defense to this action. 2nd, The mandate of the amended writ does not require the building, maintaining or operating a narrowgauge railroad between Kansas City and Independence. 3rd, Any inconvenience to the respondent performing its public corporate duties is immaterial. 4th, It is the duty of defendant to maintain and operate two separate lines of railroad between the cities of Kansas City and Independence, and the building, maintaining and operating of a double track along either of said lines of railway without, at the same time, continuing to maintain and operate the other of said lines of railway, does not constitute a compliance with said duty. 5th, It does not appear that the doing of any of the things therein mentioned was begun or being proceeded with before the commencement of this action, and taken in connection with the admissions and other allegations in said return contained, it appears that a reasonable time for the doing and completion of said things had elapsed long before the commencement of this action.

The statements of the return are admitted by the demurrer to be true. We are all of opinion that such statements, the truth of which are thus admitted, constitute a sufficient return to the alternative writ. As a matter of

course, it must, of necessity, take a considerable time in which to make the change from a narrow to a broad gauge, and to re-build the bridges across the various streams, so as to subserve the public interests, safety and welfare. Full authority for making these changes is set forth in the return and admitted by the demurrer. What is reasonable time, or a sufficient time, in which to perform the work now in progress, must depend upon the circumstances of the case, of which we are not sufficiently informed to judge. If, as a matter of fact, the respondent is not in the exercise of such diligence as is requisite in the prosecution of the work of making the change, this is a point which can be appropriately raised by a traverse of the allegation of the return.

The premises considered, we adjudge the return sufficient in law, and the relator, if so advised, may plead further. All concur.

Кетти et al., Appellants, v. Кетти.

- Estates for Life and in Remainder: ADVERSE POSSESSION. The
 possession of a life tenant is not adverse to the estate of the remainderman, and he cannot, by his declarations, acts or claim of a greater
 or different estate, make it adverse, so as to enable himself or others
 claiming under him to invoke the statute of limitations.
- 2. Adverse Possession: ACCEPTANCE OF DEED FOR LESS THAN THE FEE. Acceptance of a deed from the true owner granting a life estate to the acceptor, with remainder over, waives any rights the latter may have acquired by a former adverse possession, and precludes him and those claiming under him from asserting that his subsequent possession is adverse as against the remainderman.
- 3. The Probate of a Will is a judicial proceeding, and when made in another state a copy properly authenticated under the laws of the United States, is to be received in evidence in the courts of this State under section 1, article 4 of the Constitution of the United States.

Appeal from Lafayette Circuit Court.—Hon. Wm. T. Wood, Judge.

REVERSED.

Wallace & Chiles for appellants.

Alex. Graves for respondents.

HENRY, J.—This is a suit for partition of several contiguous tracts of land, in Lafayette county, among the children and grandchildren of James M. Keith, deceased, plaintiffs alleging that said James M. Keith, under the will of his father, James W. Keith, and a deed executed to him by the administrators with the will annexed of his father's estate, had a life estate in said lands, with remainder in fee simple to the children of said James M. Keith. Said will was made in Clarke county, Kentucky, on the 27th day of January, 1849, and admitted to probate in the county court of Clarke county on the 26th day of May, 1851, and the deed from the administrators of the estate of James W. Keith to James M., was executed May 13th, 1858, and was recorded in Lafayette county April 17th, 1879, a few days after the death of James M. Keith, which occurred in March or April, 1879.

Defendants, John Johnson and John A. S. Tutt, in their answer, set up a claim to the lands, based upon the following alleged facts: That in March, 1877, said James M. Keith borrowed of said Johnson and executed his note for \$1,850, and also executed a deed of trust to Tutt, conveying the lands in question to secure said loan, without any notice to Tutt or Johnson that he had only a life estate in the lands; that James M. Keith had, for thirty years prior to the execution of said note and deed of trust, been in the open, notorious and continuous adverse possession of said lands, claiming and using them as his. The plaintiffs, by their replication, denied all of said allegations.

The evidence for plaintiffs tended to prove that after

the death of James M. Keith, the deed from Huston and Donney, administrators with the will annexed of the estate of James W. Keith, conveying a life estate to said James M., with remainder to his children, was found among his papers and placed upon record. On the trial plaintiffs offered as evidence the last will of James. W. Keith and the probate thereof, duly certified under the act of Congress, which was rejected by the court, on the ground that it was not recorded or probated in Lafayette county. They then offered the deed from the administrators of the estate of said James W. Keith to said James M. Keith, which was also rejected. That deed purports to have been executed under and by virtue of said last will and testament of James W. Keith. It was admitted that the title to the land was in James W. Keith at the time of his death, which occurred in Kentucky in 1849. For defendants the testimony tended to prove the allegations in the answer of Johnson and Tutt, and there was evidence in rebuttal offered by plaintiffs tending to prove the contrary.

We have not thought it necessary to incumber this opinion with the testimony, or with the numerous instructions given and refused, thirteen in number, seeing no good purpose which would be subserved by incorporating them bodily into this opinion. The court found the issues for defendants and rendered a judgment accordingly, from

which plaintiffs have appealed.

One, the only instruction given for plaintiffs, declared correctly that if James M. Keith was seized of an estate 1. ESTATES FOR LIFE for life with remainder in fee to his chiladverse possession. dren, then his possession was not adverse to the estate claimed by the children, and that he could not, by his declarations, acts and conduct, and claim of a greater or different estate, make his possession adverse to his children, so as to enable him, or Tutt and Johnson claiming under him, to invoke the statute of limitations by setting up such possession. Salmons v. Davis, 29 Mo. 176.

The instructions for defendants were, except one, in

relation to the admissibility and effect of the last will and

2. ADVERSE POSSES. testament of James W. Keith, and the deed ston: acceptance of executed by the administrators of his estate to James M. Keith. The other declared that if James M. Keith, before the death of his father, was in the open, notorious, adverse and continued possession of the lands, claiming to be the owner thereof in fee, and asserting title thereto against James W. Keith and all others, the statute of limitations began to run in his favor against his father, whose subsequent decease did not suspend the operation or prevent the running of the statute in favor of said James M., and if the latter so continued in possession down to the date of the execution of the deed of trust, and the same was for a period of more than ten years duration prior to the execution of said deed of trust, then the statute vested in said James W. a good title to said lands.

- This instruction, as applied, is erroneous. James M. Keith entered into possession of the lands in 1846, and, conceding that this was such a possession as would have barred the real owner, if continued for a period of ten years, yet that real owner, his father, died in 1851, having left a last will and testament by which he devised to James M. the land in question, for life, with remainder to James M. Keith's children, and in May, 1858, the administrators of his father's estate, under and in pursuance of said last will executed to him a deed for the land, which he accepted and retained in his possession to the day of his death. deed related back to the will under which it was executed, and, accepting the deed, James M. Keith's title under the will dated back to its probate the 26th day of January, 1851, and it is admitted that in 1849 the title was in James The benefit of any adverse possession was W. Keith. waived by the acceptance of the deed, and this occurred years before Johnson lent James M. Keith the money and took the deed of trust to secure it. If James M. Keith intended to rely upon his adverse possession he should have refused to accept the deed, but he could not accept that

deed, by which a remainder in fee, after his life estate, was conveyed to his children, and then defeat their title by either a pretended or real adverse possession. It would have been such a fraud upon them as the law would not tolerate. After accepting that deed his title was circumscribed by its terms, and he could not "set up pretensions to an absolute estate, so as to make his possession an adverse one to the reversioner or remainderman." Salmons v. Daris, supra. "The reason of this is, that there is no right of action in the reversioner until the particular estate has determined, and the possession of the tenant is entirely consistent with the title of the reversioner."

The admissibility of the record of probate of the will. and of the will, and of the deed from James W. Keith's 3. THE PROBATE OF A administrators to James M. Keith, are the only remaining questions which we deem it necessary to notice. In Bright v. White, 8 Mo. 421; Haile v. Hill, 13 Mo. 618, and Lewis v. City of St. Louis, 69 Mo. 599, it was expressly declared that the probate of a will in another state is a judicial proceeding, and, when properly authenticated under the laws of the United States, is to be received in evidence in the courts of other states, under section 1, article 4 of the Constitution of the United States. The sections of our statute in relation to recording and probating wills were critically examined in Lewis v. City of St. Louis, supra, and the doctrine announced in the earlier cases was re-annunciated, and we see no reason for departing from it.

Under this view the court erred in excluding the will and the record of its probate, and the deed in question; and the judgment is reversed and the cause remanded for a re-trial, in conformity with this opinion. All concur.

McCoy et al., Appellants, v. HYATT.

- Married Woman's Personal Property. Irrespective of statute, courts of law as well as equity now recognize the doctrine that personalty may be the absolute property of the wife under certain conditions.
- 2. ——: EVIDENCE. The separate title of the wife to personalty may be established by words, acts and conduct as well as by writing; and where the proof of her ownership is clear, the fact that her husband is indebted does not affect her right.
- 3. ——: WIFE'S POSSESSION AND CONTROL. Long and uninterrupted control over personal property by the wife with the husband's acquiescence is presumptive evidence of her ownership against the creditors of her husband, where such property has not been mingled with his nor used by him so as to create a credit based upon his apparent ownership.
- 4. ——: The act of 1875. The married woman's act of 1875, (now § 3296, R. S. 1879,) in nowise interfered with the right of married women to acquire, or the manner in which they might acquire a separate estate in personalty by gift or purchase, as it previously existed. The act was designed to enlarge the operation of the right, to simplify the proof of the existence of the estate, and to afford protection especially against the effects of the husband's reducing the property to possession, by providing that no such reduction should be effectual, unless evidenced by writing signed by her.
- PURCHASES BY MARRIED WOMAN. The purchases of a married woman protected by that act are those made with her separate money or means, and those only.
- 6. ——: GIFTS TO HER: MIXED PURCHASE AND GIFT: CONVERSION. The act protects gifts as well as purchases; and where a married woman, by her pleading claimed property by virtue both of gift and purchase, and there was evidence tending to show that she acquired it in consideration partly of love and affection and partly of money paid; Held, that it was error so to instruct the jury as to permit a verdict for her only in case they found the money paid was her separate means. She might fail to show this, and consequently so far as the acquisition was a purchase it might be without the pale of the act, and yet so far as it was a gift, be protected; and the possible difficulty of ascertaining the exact extent of her interest would not warrant the court in withholding the question from the jury. Held, also, that where a married woman had such an undivided interest, if a person claiming through her husband appropriated the property to his exclusive use and denied her right altogether, that

was in law a conversion, and entitled her to maintain an action against him, as in trover, for damages, to recover her interest.

Appeal from Johnson Circuit Court.—Hon. N. M. Givan, Judge.

REVERSED.

L. T. White and John J. Cockrell for appellants.

Sparks & Campbell for respondents.

Philips, C.—The petition in this case alleges in substance that on the 23rd day of March, 1878, the plaintiffs were and are yet husband and wife; that on the day aforesaid the said Virginia was the owner in her own right by gift and purchase of a certain mowing machine described, and that, on the 25th day of March, 1878, the defendant Ramsey, with the assistance of the other defendants, with force and arms, willfully, wrongfully and unlawfully seized upon and converted the same to their own use, to her damage in the sum of \$100, for which judgment is prayed.

The answer admitted the coverture and then pleaded that at the time of the acts complained of, the defendant Ramsey was constable in said county; that defendant Hyatt having recovered judgment in a justice's court against the plaintiff, J. L. McCoy, husband of said Virginia, for \$26.20, had execution issued thereon, which came to the hands of said Ramsey as such constable, who levied the same on the machine in question; that the said Virginia having made claim in writing to said constable of said property verified by affidavit, a jury was called to try the right of property, who found the issue thus made for the said Virginia; thereupon Hyatt, with the other defendants as sureties, gave to the constable an indemnifying bond, and he then sold the machine, Hyatt becoming the purchaser at the sum of \$35, and taking the machine away. The answer then alleged property in the husband, and charged that the pre-

tended title of the wife was a fraud upon the creditors of said husband.

The reply tendered the general issue as to the allegations of ownership and fraud made in the answer. The cause was tried before the court sitting as a jury. Verdict and judgment for defendants. The case was dismissed by plaintiffs as to the constable, Ramsey, before trial.

Plaintiffs' evidence was to the effect that L. M. McCoy, the father of J. L. McCoy and father-in-law of Virginia McCoy, bought the machine sometime in 1873 or 1874; that in 1875, finding he did not need it, he offered to let his daughter-in-law have it, in consideration of love and affection and the sum of \$20, which sum she agreed to pay and The family all seem to have regarded the machine as that of Virginia after this transaction. In 1877, L. M. McCoy executed and delivered to Virginia the following bill of sale: "I, Lewis M. McCoy, of the county of Johnson, State of Missouri, have this day, for and in consideration of \$20, to me in hand paid by Virginia McCoy, the receipt whereof is hereby acknowledged, as well as for the love and affection I have toward her as my daughter-inlaw, sold and confirmed unto her one Buckeye mower of the junior pattern, and warrant the title thereof to be good. Witness my hand this 15th day of September, 1875." The debt in question was created subsequent to these transac-The evidence tended to show that at the time of the sale the machine was worth \$50

Defendant offered testimony showing that at the time of the levy, the constable went to J. L. McCoy's house and asked for a list of their property, and plaintiff, Virginia McCoy, and L. M. McCoy did make out a list which set forth certain property as the property of J. L. and other property as property of Virginia McCoy, and the machine in controversy was not at the house and was not on either list. One witness swore that in 1877, and again in 1878, J. L. McCoy offered to trade the machine in controversy for a wagon, and the last time mentioned the fact that it

was his wife's. Another testified that J. L. McCoy offered to trade it for a wagon in 1877. Another had worked for L. M. McCoy, father of J. L. McCoy, in 1873, 1874, 1875, and said that J. L. McCoy spoke of this machine as his, and, on cross-examination, admitted that J. L., while living with his father, claimed nearly everything he used. J. L. Roberts testified to selling the machine to J. L. McCoy in 1873, but on the credit of L. M. McCoy. The notes were shown to have the signature of J. L. McCoy first, and L. M. McCoy second on them. And the bank cashier admitted that L. M. McCoy was there when one of the notes matured and was paid. Another testified that a cultivator and some other articles were levied upon at the same time the mower was, and no claim was made on them.

The plaintiffs asked the following instructions, all of which the court refused:

1. If the court, sitting as a jury, believes from the evidence that the plaintiff, Virginia McCoy, acquired the property in controversy by gift or purchase, then the possession of the husband is the possession of the wife, unless the said property was reduced to the possession of the husband by and with the consent of the said Virginia McCoy in writing.

2. If the court, sitting as a jury, believes from the evidence that Virginia McCoy was put in possession of the mowing machine in controversy prior to the levy upon it by Constable Ramsey, and had never parted with her right thereto at the time of said levy, then the law presumes that she was the rightful owner thereof, and unless the defendants show, by a preponderance of evidence, to the satisfaction of the court, that she was not then the owner of said machine, it must find for plaintiffs and assess their damages at the value of said machine at the time of the levy thereon.

3. If the court, sitting as a jury, believes from the evidence that said Virginia McCoy acquired the property in controversy by gift or purchase, prior to the time of the levy thereon, then the finding will be for plaintiffs, unless

defendants have proven to the court that she sold said property to her said husband, or that he reduced it to his possession with her consent in writing.

On behalf of the defendants the court declared the law to be as follows:

1. It devolves upon the plaintiffs to show, by a preponderance of evidence, that the mowing machine in controversy was the property of Virginia McCoy at the time the same was levied upon by Constable Ramsey.

2 Unless the court finds from the evidence that Virginia McCoy purchased said machine with her separate funds from Lewis McCoy, prior to the time the same was levied upon by the constable, the finding will be for defendants.

3. Although the court should find from the evidence that Virginia McCoy did purchase the said machine on the 15th day of September, 1875, and paid \$20 for the same sometime afterward, still, unless it further appears from the

evidence that said purchase was made by the said Virginia with her own separate money and means, then the finding will be for defendants.

I. A summary review of the general question of a married woman's property rights may make clearer the conclusion I have reached in this case.

Under the common law the acquisitions of the wife enured to the benefit of the husband, and became liable for 1. MARRIED WOMAN'S his debts. As her legal existence by fiction PERTY. Of law was swallowed up in that of her husband, her possession was his. In the progress of law and justice the courts of equity interfered, under certain circumstances, as against the husband and his privies, for the protection of the wife, securing to her the enjoyment of property as a femme sole. It was long held that a trustee for her was essential as the depositary of the legal title. Courts of equity, however, soon held that rather than injustice should be done they would constitute the husband, where he held the possession, a trustee for the wife. Holt-

haus r. Hornbostle, 60 Mo. 442. And like every other principle of jurisprudence, though not changeable, yet possessing so much flexibility as to adapt itself to the growing necessities and varying circumstances of civilization and of social and domestic life it has so extended that courts of law as well as of equity recognize and adjudicate upon personalty as the absolute property of the wife under certain conditions.

Both as to the real and personal property no particular or set phraseology is essential, in the instrument vesting 2. - ; evidence, the property, to create a separate estate in a married woman. It is only necessary to this end to employ such terms of expression as indicate clearly and unequivocally the intent to vest in her the title and estate independent of the husband. And in respect to personal property the title to which may pass without deed or other instrument of writing, as by word and delivery, the separate title thereto of a femme covert can be established by acts, conduct and words, as any other fact in pais. Holthaus v. Hornbostle, supra, 443. And where the proof is clear and persuasive that the property is so placed in her, the fact of the husband's indebtedness cannot affect her proprietorship and right. As is stated by the learned judge in the case last cited, the object often in giving or transferring property to the wife of an insolvent husband, is to save her from his improvidence and worthlessness.

The existence of this separate property interest in her may be drawn and established from the facts of her long 3. ——; wife's possession and control. acquiescence of her husband in her dominion over and management of it. Welch v. Welch, 63 Mo. 57; Coughlin v. Ryan, 43 Mo. 99. In this last case our Supreme Court cite with approval the doctrine held on this question by the supreme court of Vermont. In Richardson v. Merrill, 32 Vt. 27, and in Caldwell v. Renfrew, 33 Vt. 213, it is held that courts of law, as well as of equity, will protect property coming to the wife by gift or purchase, and though no apt words in the donation or purchase may be used to

create, in the first instance, a separate estate, yet where the husband has, by his acquiescence, conceded her right of dominion over it, treating it as her property, it may nevertheless be regarded and protected as her separate estate; and this too against creditors of the husband, where the property has not been so mingled with the husband's, or so used by him, as to create a credit in his favor on the faith of his assumed ownership. Redfield, C. J., in Richardson v. Merrill, supra, page 35, says: "All who are familiar with the subject are aware that creditors and purchasers are always bound to respect counter-equities in third parties which come to their knowledge before they have actually made advances, or otherwise changed their position, in faith of the absolute property being in the person ostensibly holding it." So in Welch v. Welch, 63 Mo. 59, it was expressly conceded that the wife "never had any technical separate estate conveyed to her by any separate estate trust deed, but claims the above by virtue of their being her own earnings which the husband allowed her to keep." The court say, touching this, that if "the gift from a husband to his wife will be upheld, it is not perceived why the same result will not follow when the gift emanates from a third person when the husband assents to it, and treats the property as belonging exclusively to the wife."

The act known as the Married Woman's Act passed March 25th, 1875, (Laws 1875, p. 61; § 3296, R. S. 1879,)

in no wise interfered with her right to acquire, or the manner of her acquiring, a separate estate in personalty by gift or purchase, as it existed prior to its adoption. The act was designed to enlarge its operation, to simplify the proof of its existence, and to afford protection, especially against the effect of the husband's reducing the property to possession, by providing that no such reduction should be effectual which was not evidenced by writing signed by her. If, as a matter of fact, Mrs. McCoy received the machine by gift or purchase, exboth, from her father-in-law, and she, or some one for her,

held the possession thereof, claiming it as hers, exclusively, for a period of time running from 1875 to 1879, these would be facts from which a jury or court might conclude that she owned the property, and, if free from fraud on her part, she can hold it against her husband's creditors.

The learned judge tried this case, however, on the theory that unless the plaintiffs' claim came clearly within the operative words of a part of the act of 1875, they could not recover. The instructions, notwithstanding the case was tried before the court without a jury, become important as showing the theory upon which the court determined the case.

II. Under the act of 1875 the first instruction asked by plaintiffs was properly refused, because it authorized a recovery "if Virginia McCoy acquired the property in controversy by gift or purchase," without adding the words of the statute "with her separate money and means." So the second instruction was bad, if predicated of the act of 1875, and bad if resting on the general law, for in either case it did not sufficiently present the fact of a separate fund or estate. For a like reason the third instruction was properly refused.

The petition alleges that she was the owner in "her own right by gift and purchase." If she acquired the property by gift, that fact as effectually placed the title in her, as if she had purchased the property with her separate

The evidence of Lewis McCov (and so the bill of sale recites) was that he transferred the machine to the plaintiff, Mrs. McCoy, for the money consideration of \$20, and also on account of the love and affection he bore her. This being evidence in the case, she was entitled to have the law declared covering the whole case made by the pleadings and the proofs. The evidence on her behalf tended to show that the machine when seized was worth \$50, and the fact disclosed by the record is, that it sold under forced sale for \$35. If this was true, the actual value of the property when transferred to Mrs. McCoy was largely in excess of the money consideration expressed in the bill of sale. And if that excess was represented by the gratuitous gift, she clearly had an interest in the property to be asserted and protected. The court held, as a matter of law, however, that unless the whole title of Mrs. McCoy came by purchase, she could not recover anything. This, we are of opinion, was error.

If the real fact was that the \$20 belonged to her husband, and was not a gift to her under such circumstances as would exempt it from liability for his debts, and she was the owner of the interest represented by the amount of the gift, the interest of the husband, whatever it was, was perhaps liable to seizure under execution for the judg-

ment obtained by Wyatt against the husband.

This court has held in Wiles v. Maddox, 26 Mo. 77, that an execution under a judgment against one of two partners may be levied upon the interest of the judgment defendant in the partnership effects, or upon his interest in any portion of such effects, although there be at the time no means of knowing what the precise interest of such partner is in the common property, nor could be known until after an adjustment. And in levying such execution, the officer may seize and take into his possession the entire partnership effects. So in this case the officer would, in the event of the husband having an undivided interest in the machine, be justified in seizing the whole machine and

selling the interest of the husband therein; and the purchaser would acquire thereunder whatever interest the husband had, and no more. He would then be admitted as a tenant in common with Mrs. McCoy, but with no right to appropriate the entire property to his own use to her exclusion. And when, as in this case, he did appropriate the machine as his exclusive property and deny her right altogether to its enjoyment or any part thereof, that was in law a technical conversion of the whole property, and entitled her to maintain her action against him for damages, as in trover, to recover her interest. Watson v. King, 4 Camp. 272; Wilson v. Reed, 3 John. 175. The suit against the constable who made the seizure being dismissed, the action remained against the wrong-doer, Wyatt.

This question was passed on by the supreme court of Pennsylvania in 1879, under a statute quite similar to our Married Woman's Act. Holcomb v. People's Saving Bank, 92 Pa. St. 338. The lower court there said it could not charge the jury as requested, "as the proof was not sufficient to entitle the plaintiff to claim the whole of the property as against the creditors of the husband." But the appellate court, after declaring that the question of the wife's ownership of any part of the property should have been submitted to the jury, said: "The mere fact that there may be difficulty in determining which articles are the product of her property, did not justify the court in taking the question from the jury." So here, although there be but one article, there can be no such difficulty in determining the interest of the wife therein as would warrant the court in withholding the question from the jury.

The case, in our opinion, should be re-tried on the whole merits in accordance with the foregoing principles of law. To that end the judgment of the circuit court is reversed and the cause remanded. All concur.

Norton, J., absent.

Hoskinson v. Helferstine.

Hoskinson, Appellant, v. Helferstine.

Mowrer v. Helferstine, ante, p. 23, affirmed.

Appeal from Putnam Circuit Court.—Hon. Andrew Ellison, Judge.

AFFIRMED.

A. W. Mullins for appellant.

Smith & Krauthoff with H. D. Marshall for respondent

Norton, J.—This action was commenced by the plaintiff-appellant here-before a justice of the peace against the defendant, who was collector of the revenue of Putnam county, to recover the value of certain law books, plaintiff's property, which had been seized, levied upon and sold by defendant for the alleged purpose of collecting certain unpaid taxes for the year 1878. The plaintiff resisted the payment of the taxes in question on the ground that they were illegal and unauthorized by law, and so appeared upon the face of the tax-books. Besides a levy of thirty cents on the \$100 valuation for county revenue purposes, and thirty cents on the \$100 valuation for road purposes, a bridge tax of twenty cents and a county poor fund tax of five cents on the \$100 valuation were levied and extended in separate columns on the tax-books. These last two items of taxes were claimed to be illegal by plaintiff, and he refused to pay them. The circuit court held, and so declared the law to be, that "said bridge and poor taxes appear on said taxbook to be unauthorized by law," but after having so declared the law, the court decided that the plaintiff could not recover, and accordingly gave judgment for defendant. To reverse this judgment the plaintiff appealed the case to this court.

The very same point involved in this appeal has been passed upon adversely to appellant in the case of Mourer

r. Helferstine, ante, p. 23, and for the reasons given in that opinion, the judgment of the circuit court is affirmed, in which all concur, except Judge Sherwood.

STIRLING, Appellant, v. WINTER'S EXECUTOR.

- Administrator: Legal effect of his note in louisiana. By the law of the state of Louisiana an administrator cannot, by executing a promissory note in his name as administrator, bind the estate of the decedent; but he will ordinarily bind himself. If, however, he can show by competent evidence that the note was executed and received merely as an acknowledgment that the estate owed the debt, he will be permitted to do so; but parol evidence is not competent.
- Limitations: Foreign cause of action. Whether a suit brought
 in this State on a cause of action originating in another state is
 barred by limitation, is to be determined by the law of this State.

Appeal from St. Louis Court of Appeals.

REVERSED.

Fisher & Rowell and Gilliam & Ferriss for appellant.

Given Campbell for respondent.

Henry, J.—This cause originated in the Probate court of the city of St. Louis, in which plaintiff prosecuted for allowance against said estate, of which Theodore Hunt is administrator, a promissory note, of which the following is a copy:

"\$6,566.45. BAYOU SARA, LA., June 1st, 1871.

One year after date we jointly and severally promise to pay to the order of Henry Stirling, minor, at whichsoever place he may designate, \$6,566.45, for value received, with interest at the rate of eight per cent per annum from date until paid.

SARAH M. WINTER,

Administratrix and Tutrix to the minor children of W. D. Winter. Samuel Winter, Co-heir."

The claim was allowed against the estate of Mrs. Winter by the probate court, and on appeal to the circuit court, was again allowed, but, on appeal to the court of appeals, that judgment was reversed, and the plaintiff has prosecuted his appeal to this court, and the only question of which we deem it necessary to take more than a passing notice, is whether, by signing the note in suit, as administratrix and tutrix, Mrs. Winter bound herself personally for its payment.

When the note was executed she was the administratrix of her husband's estate, and tutrix to his minor children. After the death of her husband, and soon after this note was made, she removed to the city of St. Louis, where she died, leaving an estate, estimated at about \$60,000, mainly the proceeds of insurance upon her husband's life. Mr. Winter was the agent of Mrs. Mary C. Stirling, a widow, the mother of his wife and of the plaintiff, and after his death, was found to be indebted to her on open account in the sum for which the note in suit was given. The settlement on which that note was based, was made by his son, Samuel Winter, who also signed the note as coheir. At the request of Mrs. Stirling, the note was made payable to her son, the plaintiff, then a minor, to whom she was then indebted in that amount. The note was delivered to her, and when plaintiff arrived at age, was delivered by her to him.

The court of appeals, in the opinion delivered, very ably and elaborately reviewed the decisions of the supreme court of Louisiana, by the law of which state the question is to be determined, and only after a very careful examination of the same authorities relied upon by the court of appeals, have we reached a conclusion different from that arrived at by that court.

In Flower v. Swift, 5 Mart. (N. S.) 529; s. c., 8 Mart (N. S.) 449; Russell v. Cash, 2 La. 185; Hestres v. Petrovic, 1 Rob. (La.) 119; Winthrop v. Jarvis, 8 La. An. 434; Beatty v. Tete, 9 La. An. 130, and Livingston v. Gaus-en, 21 La.

An. 286, this general doctrine is distinctly recognized: "That an executor, or other administrator, by making or indorsing a note in that capacity, cannot thereby bind the estate, but will make himself personally responsible for the amount; that he cannot, in any transaction, in which he pretends to act as such, create any liability on the estate or change the nature of its obligations, or increase its responsibility in regard to its outstanding debts, and if he do so, he will be personally bound."

By the code of Louisiana, an executor or administrator is authorized to examine a claim against the estate; and, if he approve it, it is presented to the probate judge for classmication, but if he disapprove it, and the claimant persists in asserting it, it is then adjudicated in the probate court. Section 985 of the code provides on this subject, that on the presentation of a demand against the estate, the executor or administrator, if he approve it, "shall write on the evidence of the claim, or on a paper which he shall annex to it, a declaration, signed by him, stating that he has no objection to the payment of such claim." It is contended by respondent, that the execution of the note in question was only an approval of the claim, under that section of the code; and that, although Mrs. Winter was prima facie personally bound by the note, it may be shown that it was her intention, and the understanding of the parties, when she signed the note, that the estate, and not she, was bound for its payment, and that such testimony is admissible; and he cites Gillet v. Rachal, 9 Rob. (La.) 276, and The Bank of Louisiana v. Dejean, 12 Rob. 16.

The controversy, however, is not whether the understanding of the parties, or intent of the makers, that she was not to be held personally bound for the payment of the note, may be shown, but in regard to the character of the evidence by which such understanding or intent may be established, respondent contending that proof of a verbal understanding to that effect, contemporaneous with or antecedent to the execution of the note, is admissible for that

purpose; and such seems to have been the opinion of the court of appeals.

The cases mainly relied upon to establish this view, are the two cases last cited. In Gillet r. Rachal, the administrator had given a note as such for a demand against the estate, but at the foot of the account for which the note was given the curator gave to the administrator a receipt, at the time, stating that when the note was paid it was to be in full of the account. The court held that this was not a novation, and that the administrator was not person-The following are the observations of the court in this connection: "An executor or administrator. by making or indorsing a note, in that capacity, cannot thereby bind the estate, but will make himself personally responsible for the amount. In this case it is shown that the debt for which the administrator signed the note, was due by the estate of Pierre Baulos, and that the note, by the express agreement of the parties, created no new liability but only acknowledged that of the succession." The note and receipt at the foot of the account for which it was given, taken together, constituted the entire contract between the parties, and by that contract it was agreed that the execution of the note was only an acknowledgment of a debt of the succession or estate, as it was construed by the supreme court in that case.

In the Bank of Louisiana v. Dejean, the court, recognizing and re-affirming the doctrine of all the cases, that the executor makes himself personally liable on a note executed by him as such for a debt owing by the estate, held that the executor there was not personally liable on a note given in renewal of a note originally made by the testator, with the same indorsers who were on the original note as such, the executor having paid part of the debt at each renewal until from an original indebtedness of the testator by note of \$1,360 it was reduced to \$366, the amount for which the last renewal note was given.

It must be conceded that this decision gives some

plausibility to respondent's position; and while, with due deference to that court, we think the case not in entire harmony with its previous adjudications, yet the reasoning upon which the decision was based, recognized palpable distinctions between that and such cases as that now under consideration, distinctions so marked, that we do not think that that court would have held that case decisive of this. Said the court: "This was not creating a liability on the testator's estate. It was not even changing the nature of the original obligation of the deceased. The debt existed at the time of his death, and the acts of appellant cannot be viewed in any other light, than as an acknowledgment of said debt, which he was perfectly competent to acknowledge." Again: "Here no new debt or liability has been created, the note sued on is merely evidence of the balance due to the plaintiff by Andrus' estate on the original note, which was acknowledged and renewed by the defendant, in his capacity of executor. The nature of the debt is not changed; the parties are the same, and their liability is also the same; and we think the defendant has been incorrectly made responsible for its payment." In the case at bar the nature of the debt was changed, the time and place of payment were changed, the person to whom it is made payable is not the same person to whom the money was owing by the intestate. The administratrix executed it, not only as such, but as tutrix of the intestate's minor children, and it was also executed with her by Samuel Winter, as co-heir. Not a vestige of the original obligation remains, except the amount, and even that was not ascertained until after the death of W. D. Winter. If this note had been presented to the probate court in Louisiana for allowance against the estate, and resisted, will it be contended, in the face of the repeated adjudications of the supreme court of Louisiana, that it could have been allowed? Proof of the administratrix's intention, expressed when it was executed, that she intended it merely as an acknowledgment of the debt of the estate, would have been held 10-80

for naught. The answer of the court, if it had spoken the language of the supreme court of that state, repeated again and again, would have been: "An executor or administrator, by making or indersing a note in that capacity, cannot bind the estate, but will make himself personally responsible for its amount." Livingston v. Gaussen, 21 La. An. 286.

Not only is this the case in Louisiana, but it is the same in other states, in which the common law prevails. 1 Parsons on Notes and Bills, 161. And here it may be remarked, that the demand for which the note was given has never been paid by the estate, so far as the record shows. The common law rule is, that "parol contemporaneous evidence is inadmissible so contradict or vary the terms of a valid written agreement," (1 Greenleaf Ev., § 275,) and when parties have deliberately put their engagement in writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing and all oral testimony" of a previous, contemporaneous or subsequent colloquium is rejected. This rule of evidence also obtains in the state of Louisiana. 6 La. 278; 21 La. An. 505; 10 La. An. 704; 29 La. An. 567. Numerous other cases might be cited from the reports of cases decided by the supreme court of that state in which the rule is declared, but the foregoing are sufficient, there being none to the contrary.

If parol evidence of an intention, by such a note, to bind the estate and not the administrator, were admitted, it would be but cumulative evidence to that of the note itself, upon the face of which it is manifest that such was the intent. Moreover, it would be inferior evidence of the intent to that furnished by the note. The law, notwithstanding such an intent is manifest on the writing, presumes conclusively that a contrary intent existed, unless by evidence of equal dignity, it can be shown that the inten-

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tion was as expressed in the note, as in Gillet v. Rachal, supra. The proposition of respondent briefly is, that the intent to bind the estate, shown by the writing itself, will not suffice, but, if such an intent can be shown by parol evidence, the object will be accomplished. The law presumes a personal obligation from the fact of the execution of the note by an administrator as such, because it will not bind the estate, and would be a nugatory act, if it did not bind the administrator personally. The parol evidence offered and excluded would have shown nothing more than that previous to and at the execution of the note, it was understood between the parties that the estate, and not Mrs. Winter, was to be bound by the note. For the foregoing reasons we think that the evidence was properly excluded.

We are also satisfied that the question of limitations is governed by the law of this State.

We are of the opinion that the judgment of the court of appeals should be, and it is accordingly reversed, and the cause is remanded to that court with directions to enter a judgment affirming that of the circuit court. All concur.

JACKSON V. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAIL-WAY COMPANY, Appellant.

- Reviewable Errors. Where no exception to the action of the court in overruling a motion for new trial is saved in the bill of exceptions, this court is limited to an examination of such errors as may appear in the record proper.
- 2. Railroads: KILLING LIVE STOCK: SUFFICIENCY OF COMPLAINT. In an action against a railroad company to recover for the killing of plaintiff's mare, the complaint alleged that the killing occurred where the railroad "was not fenced, and where there was no crossing on said railroad, "that defendant had failed and neglected to maintain good and sufficient fences on the side of its

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road where said mare got on the track and was killed; and that by reason of the killing of said mare and by virtue of the 809th section of the Revised Statutes," judgment for double damages was prayed. Held, that these allegations and the reference to the statute sufficiently implied that it was defendant's duty to erect and maintain fences at the place, and that the mare got on the track in consequence of defendant's failure to do this, and that the complaint was good after verdict.

 Pleading Legal Conclusions. An issue raised on the statement of a legal conclusion which presents the real point in controversy, will be regarded as sufficient after verdict.

Appeal from Butler Circuit Court.-Hon. R. P. Owen, Judge.

AFFIRMED.

Smith & Krauthoff with T. J. Portis for appellant.

L. M. Davidson for respondent.

Hough, C. J.—No exception to the action of the court in overruling the motion for a new trial was saved in the 1. REVIEWABLE E.B. bill of exceptions, and we are, therefore, limited to an examination of alleged errors in the record proper. Wilson v. Haxby, 76 Mo. 345; State ex rel. Estes v. Gaither, 77 Mo. 304.

The only question arising upon the record proper is as to the sufficiency, after verdict, of the following statement:

2. RAILBOADS: k 111- "Plaintiff states defendant is a corporation ing live stock: sufficiency of complaint under the laws of the State of Missouri; that on the 20th day of March, 1880, in Poplar Bluff township in Butler county and state aforesaid, and where its said railroad was not fenced, and where there was no crossing on said railroad, the defendant, by its agents and servants, while running its locomotive and train of cars on its said railroad, did then and there run over one mare, the property of plaintiff, and of the value of \$60, and thereby killed her; that defendant had failed and neglected to erect and maintain good or sufficient fences on the sides of its said railroad, where said mare got on the track and was

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killed; that by reason of the killing of said mare as aforesaid, and by virtue of the 809th section of the Revised Statutes of the State of Missouri, judgment is prayed for \$120, being double the value of said mare killed as aforesaid, together with costs."

In the case of Sloan v. Missouri Pacific R'y Co., 74 Mo. 47, the statement was held insufficient because it contained no averment that the injury complained of was occasioned by the failure of the defendant to erect and maintain fences as required by law, nor any equivalent averment nor any averment from which it might be interred that the injury was occasioned by such failure. In Brown v. H. & St. Jo. R. R. Co., 75 Mo. 427, the statement alleged that: "The killing of the animal was done in the county of Clinton, Lafayette township and State of Missouri; that defendant's fence was down and in such condition as to allow animals to come and go inside of the inclosure at pleasure, contrary to the statutes of Missouri, and by reason of such negligence of defendant, and without any fault of plaintiff, the said engine did strike and kill plaintiff's steer, for which he claims double damages," etc. This statement was held to be sufficient after verdict on the authority of Edwards v. Kansas City, St. Jo. & C. B. R. R. Co., 74 Mo. 117, and the decision in this case was affirmed in Nance v. St. Louis, I. M. & S. R'y Co., 79 Mo. 196. In Belcher v. Missouri Pacific R'y Co. 75 Mo. 515, the sufficiency of the following statement was questioned in this court: "That plaintiff was the owner of one cow, of the value of \$40, and of two sheep, of the value of \$7, which cow and sheep, without fault of plaintiff, strayed upon the track of said railroad on or near a farm crossing at a point on the line of said railroad in Big Creek township, Cass county, where said road was not fenced, and where the crossing and cattle-guards were not made as the law requires: that defendant, by its agents and servants, so carelessly and negligently ran and managed its said cars and locomotive that they ran against and over said cow

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and sheep," etc. This statement was also held sufficient on the authority of Edwards v. Railroad Co., supra.

The statement now under consideration is in all respects a fuller and better statement than either of the two above set forth and held by this court to be sufficient, and unless we depart from the rule applied in those cases we cannot hold the statement before us to be insufficient. We, therefore, hold it to be good.

The statement that the defendant failed and neglected to erect or maintain good or sufficient fences where the mare got on the track, and the reference to section 809 of the Revised Statutes, imply that it was the duty of the defendant to erect and maintain fences at said place, and that the mare got on the track in consequence of such failure.

Conceding that the implication stated is a conclusion of law, yet an issue raised on the statement of a legal con
3. PLEADING LEGAL clusion which presents the real point in conclusions

controversy will be regarded as sufficient after verdict. Bliss on Code Plead., § 334.

In Asher v. St. Louis, I. M. & S. Ry Co., 79 Mo. 432, the statement was held to be defective because it failed to allege that the animals got upon defendant's road at a place where the company was by law required to fence, and there was no allegation, as in the present case, from which that fact could be inferred. In Bates v. St. Louis, I. M. & S. Ry Co., 74 Mo. 60, the statement was substantially like that now before us, but the court did not specifically pass upon the clause of the statement on which our judgment in this case is based.

The judgment of the circuit court will be affirmed. All the judges concur.

ATKISON V. HENRY et al., Appellants.

Husband and Wife's Joint Estate in Land, Conveyance of: TITLE BOND: EQUITY. Where husband and wife are seized in entirety, the husband may, without joining his wife, convey his legal or equitable estate, subject to her right of survivorship. But, where the husband alone executed a title bond for such land, Held, that the wife's estate could not be divested by reason thereof, although she afterward received from her husband part of the purchase money and thereupon expressed satisfaction with the sale.

Appeal from Bates Circuit Court.—Hon. F. P. Wright, Judge.

REVERSED.

Plaintiff deraigned title through a deed from Joel Wisely to his daughter, Martha Hensley, and her husband, George B. Hensley, executed June 8th, 1857; a bond for a deed dated August 17th, 1858, not acknowledged, from George B. Hensley, alone, to Thomas H. Starnes, conditioned upon payment of a note by Starnes for \$150 due one year after said date and given for part of the purchase money; and a deed to plaintiff from Starnes' administrator. Defendant Henry deraigned title from the Hensleys by their deed dated September 7th, 1867, to the heirs of R. B. Fisher, and a deed from said heirs to defendant, dated July 26th, 1867.

The testimony was to the effect that neither at the time of the execution of the title bond, nor at any time prior thereto, did George B. Hensley consult with his wife in relation to the sale of the land, but that, about two weeks thereafter, he gave to her the \$150 note for part of the purchase money upon her declaration that she would then be satisfied with the sale. She sold the note and received the money for it. A judgment in favor of the holders of this note was obtained against Starnes, the maker, and the land was sold by the sheriff October 11th, 1860, upon an execution issued upon the judgment. At the sale

Fisher purchased the land, but the sheriff's deed, if any was executed, was not recorded nor offered in evidence. There was some testimony that Fisher at the sale stated that he was bidding in the land for Starnes, that afterward Starnes expressed to Fisher a wish that he should keep the land, and some conflict of evidence as to whether thereafter Starnes made claim to the land. Martha Hensley testified that when she and her husband went to Linn to sign the deed of September 7th, 1867, they supposed such deed was to be made to Starnes or his legal representatives; that when they saw it was made to the Fisher heirs, they inquired the reason and were informed that they had bought Starnes' interest, and that she signed to perfect the title in the person holding under Starnes; that the \$50 consideration expressed in the deed was received by them for making the deed, but not as part of the purchase money for the land.

A. Henry for appellants.

C. C. Bassett and Smith & Shirk for respondents.

Sherwood, J.—This is an equitable proceeding, having for its object the divesting of whatever legal title the dcfendants, or either of them, may have in the premises in controversy, and the vesting of the same in the plaintiff. This object was attained by the decree entered by the court below in favor of plaintiff. Hensley and Martha, his wife, were seized in entirety of the land in dispute, and they are the common source of title. But the title bond executed by Hensley alone to Starnes for that land only had the effect of conveying to him whatever equitable right Hensley had thereto, and this right was subject to be defeated entirely, or, to speak more accurately, terminated by Hensley's death occurring anterior to that of his wife. And no doubt is entertained that it was competent for Hensley to alien by his title bond his equitable right in the land, as well as he could transfer his legal title in the same by his

deed executed without joining his wife with him. These positions are fully supported by *Hall v. Stephens*, 65 Mo. 670, and cases cited.

The result of these positions is, that plaintiff by his purchase at the administrator's sale only acquired whatever equitable right Starnes had in the land by reason of execution to him of the title bond by Hensley. After the execution of that bond the rights of Hensley's wife remained as they were before, and had Hensley died with matters thus remaining, it is clear from the authorities cited that his wife would have taken the whole estate as the survivor, just as she would have done had no transfer of either the legal or equitable interest of her husband occurred. If Starnes never parted with his equitable interest in the land acquired through the medium of the title bond from Hensley, then plaintiff as a matter of course acquired that interest, but no more; there still remained outstanding in Hensley's wife her interest in the land unaffected by anything done by her husband. And the fact that she accepted the note for \$150 given to her husband by Starnes, as and for part of the purchase money, and was satisfied with the sale made by her husband after she ascertained it, cannot vary the result. The mere acceptance by the wife of a portion or all of the purchase money of a tract of land in which she holds the fee, or of which she together with her husband is seized in entirety, constitutes in equity no ground for compelling specific performance or of extorting a deed from her.

Nor if said deed had been made either to the wrong person or for the wrong tract of land, does equity possess any power to make the deed speak the intention of the parties by reforming it. Shroyer v. Nickell 55 Mo. 264, and cases cited; 7 Cent. L. Jour. 182, and cases cited. When possessed of the legal title to lands, either in her own right, or with her husband of an estate in entirety, the only way she can manifest her intention to convey, or her consent to the conveyance of her interest in such lands, is by a deed executed

in conjunction with her husband and acknowledged as the statute prescribes. Devorse v. Snider, 60 Mo. 235; Baldwin v. Snowden, 11 Ohio St. 203; Ackert v. Pultz, 7 Barb. (N. Y.) 386; Shroyer v. Nickell, supra. And the certificate of acknowledgment to such deed is the only thing which gives authenticity to the deed of a femme covert, the only repository which the law recognizes of the fact that she intended to convey to the grantee named in the deed the tract of land therein described.

If she intended to convey to a different party, or, what in effect amounted to the same thing, if she intended to convey a different tract of land, and failed in this, all that can be said is that: "A femme covert is utterly incapable of binding herself by a contract to convey her land, either at law or in equity, except by compliance with the prescribed statutory forms. An attempted contract on her part is not such compliance, nor is her disappointed intention to convey clothed with those forms." Shroyer v. Nickell, supra. And as before stated, the reception by Martha Hensley of the note for \$150 given by Starnes for a part of the purchase money, cannot change the rule which prevails in courts of equity in this regard.

In Purcell v. Goshorn, 17 Ohio 105, Avery, J., observed: "No precedent, as it is supposed, can be found of a decree against a femme covert to convey land held by descent, or by the usual conveyance, upon the ground of her having agreed to convey or her having executed a defective conveyance, whether upon a full consideration paid or not; and the fraud of the wife in the transaction would make no difference. That a mistake in a deed cannot be corrected against a married woman, was decided in the case of Carr v. Williams, 10 Ohio 305."

The most that courts of equity have ever done in cases of this sort, cases where a *femme covert* is the recipient of the purchase money of land and fails from any cause to make an effective conveyance of the land sold, is to declare and hold the land bound for the re-payment of the pur-

chase money. Such a ruling as this has passed into precedent in *Shroyer v. Nickell*, supra, and in *Pilcher v. Smith*, 2 Head 208, and it is strongly intimated in *Martin v. Dwelly*, 6 Wend. 9, where the subject of the disability of a married woman to convey her land in any manner save that pointed out by the statute, is discussed with distinguished ability and the authorities exhaustively reviewed.

Speaking on this subject, Mr. Justice Story says: "This disability can be overcome only by adopting the precise means allowed by law to dispose of her real estate; . as in England by a fine, and in America by a solemn conveyance." 2 Eq. Jur., § 1391. And the ruling just cited of charging the land of a femme covert with the purchase money when prematurely paid, i. e., when paid before a deed perfect in all its parts, executed and acknowledged, is delivered to the purchaser, is a ruling based upon an idea altogether independent of contract or of a valid contract having been made, but proceeds upon the idea that such premature payment creates a constructive or implied trust or lien in favor of the vendee. Adams Eq., 126, 127; Mackreth v. Symmons, 15 Ves. 344, 353; 2 Story Eq. Jur., §§ 1215, 1217, 1218, 1220, and cases cited. So that it matters not, so far as the lien of the vendee for money prematurely paid is concerned, whether such vendor was sui juris or whether a valid contract was made or not.

Taking the premises here laid down as correct, and they are supported by an overwhelming weight of authority, what interest did Atkison acquire by reason of his purchase at the administration sale? If Starnes, the decedent, had lived, the most he could have done, and the best he could have done, according to the authorities, would have been to have gone into a court of equity and compelled a conveyance to him of Hensley's legal title in the land, and as to Mrs. Hensley he could perhaps have had the purchase money declared a lien on the land, and the land sold unless the purchase money were re-paid; on this point, however, no opinion is expressed. But beyond the acquisition of

Hensley's legal title he could not have gone, nor did he acquire by reason of his purchase from Hensley any interest whatever in the legal or equitable right of the wife in the land. Yet notwithstanding this, if Hensley had outlived his wife, whatever right Hensley possessed would have gone to Starnes in consequence of the title bond executed to Starnes by Hensley. If then Starnes died the possessor of all the rights he acquired by the title bonds; if they never passed by release or transfer to Fisher, then Atkison is now the possessor of those rights, and, if Hensley should survive his wife, Atkison will be the equitable owner at least of the land in controversy, and will be entitled to the legal title corresponding to his equitable title.

But there is no inconsiderable amount of testimony tending to show that whatever interest Starnes had in the land had been transferred to Fisher. The testimony of Mrs. Dobbins tends to induce belief that Starnes transferred to Fisher all of his interest in the land in question. And there are other circumstances pointing in the same direction. But should it be assumed that no such transfer to Fisher occurred, still I have been unable to find in this record sufficient evidence to warrant a court of equity in holding that Fisher's heirs or that Henry were purchasers with notice of Starnes' interest in the land, or that either of them were guilty of any fraudulent conduct in obtaining a deed from Hensley and wife to Fisher's heirs for the land, or in conveying or in having conveyed that land to Henry. But if it be true that Atkison, by reason of his purchase at the administrator's sale, acquired all the equitable interest in the land Starnes ever possessed, still he acquired no more than that which was the interest Hensley, the husband, had in the land, subject to his wife's right of survivor-But certainly Atkison, by his purchase, did not acquire any interest either legal or equitable in Mrs. Hensley's estate in the land, and this for the sufficient reasons: 1st, Atkison's purchase at the administrator's sale occurred after the deed made by Hensley and wife to Fisher's heirs;

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and 2nd, His purchase was measured by the title bond of Starnes, which only embraced Hensley's interest and not his wife's interest in the premises in dispute. If then fraud was practiced by Henry in procuring the deed from Hensley and wife to Fisher's heirs, or if Hensley and wife made a mistake in conveying to those heirs, such fraud or such mistake concerned Atkison only so far as respects Hensley's legal estate in the land, and this only on the supposition that Starnes' interest remained intact down to the time of his death.

Even, however, if Starnes did then remain the equitable owner of Hensley's interest in the land, if either Fisher's heirs or Henry are to be regarded as purchasers without notice of Starnes' claim, then Henry acquired the entire title in the land in controversy. In consideration of the foregoing, if it be taken for granted that Henry is a purchaser with notice of Starnes' interest; that he practiced a fraud on Mr. and Mrs. Hensley in inducing them to make a deed to the Fisher heirs, still for the reasons already stated the decree of the court below is too broad in divesting out of Henry the legal or equitable interest of Hensley's wife, as well as the legal title of Hensley himself. Upon no theory of the case ought the decree to have embraced more than the legal interest of Hensley himself. And it may be remarked in conclusion, that in order to establish mistake or fraud in making a deed to the wrong person, in order thereby to divest an estate already vested by deed, the evidence ought to be so clear, strong and unequivocal as to leave no room for reasonable doubt in the mind of the chancellor. Forrester v. Scoville, 51 Mo. 268; Fessenden v. Ockington, 74 Me. 123, and cases cited.

The judgment is reversed and the cause remanded. All concur.

CHAPMAN et al., Appellants, v. KERR.

- Sale or Consignment? EVIDENCE. Plaintiffs made sundry shipments of goods to defendants, and with them in each case sent bills in the form of ordinary merchants' bills of sale. Held, that if nothing appeared to the contrary, the jury were warranted in finding that the goods were sold, and that they could not find that they were consigned unless there was contradictory evidence clearly preponderating.
- 2. ——: ——. In order to overcome the presumptive evidence of a sale of goods, furnished by a bill accompanying the delivery thereof in the form an ordinary sales bill, it is not necessary to prove that such goods were received and accepted as a consignment if, pursuant to agreement, consigned for sale.
- 3. ——: DEPOSITIONS, WHEN ENTITLED TO BE READ. A deposition taken pursuant to a stipulation that it should be read on the trial of the cause, subject to all objections on the grounds of irrelevancy, illegality and incompetency, may be read in evidence, although the witness at the time of the trial is within the jurisdiction of the court.
- 4. ——: REPLEVIN, VALUE OF GOODS HOW ASSESSED: DAMAGES. In an action of replevin, where the defendant claims the goods replevied and demands a return thereof, and the jury find in his favor, they should assess the value of the goods at the time of such assessment, and the damages, if any, sustained by defendant in consequence of the taking and detention. Pope v. Jenkins, 30 Mo. 528, followed; Woodburn v. Cogdal, 39 Mo. 228, and Miller v. Whitson, 40 Mo. 101, disapproved.

Appeal from Jackson Special Law and Equity Court.—Hon. R. E. Cowan, Judge.

REVERSED.

Bryant, Holmes & Waddill for appellants.

Botsford & Williams and Scarritt & Scarritt for respondents.

Henry, J.—This is an action of replevin, instituted in the law and equity court of Jackson county by plaintiffs against defendants, to recover personal property, consisting

of lamp chimneys, lamps, globes, etc. Plaintiffs were wholesale queensware merchants at Chicago, in November, 1878, and Kerr & Clark then commenced business in Kansas City as retailers of queensware, and also did an auction business. This firm continued under the name of Clark & Kerr until March, 1879, when Clark went out of the firm, and Kerr continued the business until July 27th, 1879, when he made an assignment to Watts for the benefit of creditors. The principal question for the jury to determine, was whether the goods in question were sold to Clark & Kerr, and Kerr after the dissolution of the firm, or were consigned to them for sale on plaintiffs' account.

The goods, with the exception of one shipment, were all ordered by Kerr from time to time, as he desired. The only goods received from plaintiffs on verbal order, was the first shipment which Kerr ordered in person at plaintiffs' house in Chicago. Shipments extended from November, 1878, to July, 1879. In shipping the goods, plaintiffs sent Kerr a bill of the goods sold; and the bill in each instance, was in the form of an ordinary merchant's bill of sale of parcels, and recited that Clark & Kerr, and, after the dissolution of that firm, B. B. Kerr, bought of Chapman, Grier & Co., the plaintiffs, the items of goods described in the bill, and opposite each item plaintiffs set out the price at which the goods were sold, which was the same price at which plaintiffs sold the same class of goods to others. In quite a number of the bills sent to Kerr, the following statement was added: "Terms sixty days, or three per cent off for cash, if remitted in ten days from date of invoice." When plaintiffs sold Kerr these goods, they entered an itemized account of the goods sold in their ledger, and charged Kerr with the full amount, as in the bills rendered to him. These accounts were kept in the same book, and in the same manner, as accounts of goods sold to other purchasers, and were ordinary debtor and creditor accounts. No directions were given by plaintiffs to either Clark & Kerr, or Kerr, to keep the goods separate and distinct from

the other goods of Clark & Kerr, nor were they so kept, nor did they give to Clark & Kerr, or either, directions to keep an account of the goods, on the basis of consignment. There was no agreement as to the price for which Clark & Kerr, or Kerr, should sell the goods, or as to commissions they should receive on sales. Plaintiffs at no time before the dissolution of the firm of Clark & Kerr, requested a statement of account from that firm, nor was any ever made to them either by the old firm or Kerr, and, from time to time, Kerr gave plaintiffs notes and made payments, which were credited by plaintiffs generally on the account in plaintiffs' books.

The evidence for plaintiffs tended to prove that the goods were not sold to Clark '& Kerr, or Kerr, but were consigned to them by plaintiffs for sale, under an agreement made with Kerr, when the first shipment was made. court instructed the jury, at plaintiffs' instance, that "if the goods in controversy were shipped by plaintiffs to Clark & Kerr, or Kerr, their successor, as consignees, the verdict should be for plaintiffs." And refused one asked by plaintiffs to the effect that "if the goods were shipped by plaintiffs under an agreement between the parties that they should be consigned to Clark & Kerr, to be sold for plaintiffs, the verdict should be for plaintiffs," notwithstanding said goods were billed to the consignees on the ordinary bill-heads used by plaintiffs in case of goods sold and delivered, and notwithstanding Clark was never informed that said goods were not sold to Clark & Kerr.

By defendants' instruction number two, it was conceded that the bills of shipments were not conclusive evidence of a sale of the goods, but that it was competent? evidence. petent for plaintiffs to show that, notwithstanding the delivery of these bills, the goods were really consigned to the consignees, as bailees and not as purchasers, and that is substantially what was declared by plaintiffs' refused instruction. Appellant complains that the court, in that instruction for defendants, declared that

the bills of goods accompanying the shipment, "were presumptive evidence that the goods were sold." The court did not declare that the law presumed a sale, but it was in effect a declaration that the jury might find, from the character of these bills, nothing appearing to the contrary, that the goods were sold to Clark & Kerr. Those bills were memorandums of sales, and it is going far enough to hold, as the court did in instructions given at defendants' instance, that it might be shown notwithstanding the delivery of those bills, that the goods were not sold, but consigned to be sold by consignees for plaintiffs. Nor was the instruction too emphatic in its declaration, that the evidence contradictory of those bills, to authorize a jury to find a consignment instead of a sale, should clearly preponderate.

That portion of the instruction is objectionable which declares that the jury should find, in order to overcome the presumptive evidence furnished by the bills of the goods, that they were delivered on consignment and were received and accepted on consignment, and not otherwise. If by the agreement they were not sold but consigned for sale, the consignees could not invest themselves with title by receiving them as purchasers, unless by somé subsequent act it could be inferred that the consignors agreed that the consignees should hold as purchasers. There was evidence tending to prove that the goods were not sold by plaintiffs, and also that the consignees received and treated the goods as theirs by purchase. Therefore, under this instruction, if the jury found that the goods were not sold, but only consigned for sale, before they could find a verdict for plaintiffs, they had also to find that Clark & Kerr received and accepted the goods as consignees, and not as purchasers.

It appears from the record that the assignment by Kerr was made to Watts, on whose refusal to act as assignee, Scarritt was appointed by the court, and the court instructed the jury that Scarritt's title took effect from the time the assignment was executed, acknowledged and recorded, and

that defendant Kerr was not a real party in interest, and no declaration or act of his, after the assignment, was recorded, could affect or impair the assignee's title, and that no declaration made by Kerr, after the assignment was recorded, should be considered by the jury. Appellants contend that the effect of that instruction was to exclude from the consideration of the jury statements made by Kerr on his cross-examination to the effect that the original arrangement between him and plaintiffs was for goods on consignment, and that no other arrangement had ever been made. The instruction certainly had no such scope, and the jury, we think, could not have understood that the instruction to disregard declarations made by Kerr, extended to statements made by him in his deposition, as a witness in the This objection, however, may be obviated on a retrial of the cause.

That deposition was taken by consent and under an agreement in writing entered into by the attorneys for the 3. ____: depositions, parties respectively. It was stipulated that it should be read on a trial of the cause, subject to all objections on the grounds of irrelevancy, illegality and incompetency. Plaintiffs objected to the admission of the deposition, as evidence, on the ground that Kerr was then in Kansas City, where the cause was on trial, as appeared by the officer's return upon a subpæna issued by plaintiffs for Kerr. The court overruled the objection and the deposition was read. Our first impression was, that the deposition should have been excluded, but a careful consideration of the agreement has led us to a different conclusion. It was taken by consent of parties, and afterward, as it appears from the agreement, it was stipulated that it should be read at the trial, subject to objections on grounds of irrelevancy, incompetency and illegality. The objection that Kerr was within the jurisdiction of the court was not one of those which plaintiffs reserved the right to make on When a deposition is taken on notice, in the abthe trial. sence of stipulations on the subject, the deposition cannot

be read, if the witness is present, but clearly by the agreement in question, the plaintiffs waived their right to make that objection. Kerr's presence did not render the testimony given by him irrelevant or incompetent, and certainly did not affect the legality of the taking of the deposition.

The trial resulted in a verdict and judgment for defendants, and the value of the goods found by the jury, 4. ____: replevin, under an instruction of the court, was the value of goods how assessed: damages. market value at the time the suit was brought. This question was considered in the case of Pope v. Jenkins, 30 Mo. 528, and it was there held that the value of the goods, at the time of the assessment, is the value to be found by the jury, and if depreciated in plaintiffs' hands, in consequence of the replevy of the goods, or by his acts after the replevy, the jury should consider such depreciation in their estimate of damages occasioned by the taking and detention. Woodburn v. Cogdal, 39 Mo. 228, and Miller r. Whitson, 40 Mo. 101, are cited as announcing a different doctrine. In both of those cases, the question before the court seems to have been the measure of damages. latter it is observed: "It is well settled by the decisions of this court that the measure of damages in such cases, where the finding of the jury is for the defendant, is the value of the property when taken with legal interest thereon to the time of trial." No authority whatever is cited in the opinion, nor in that delivered in Woodburn v. Cogdal, in which it was said: "The true measure of damages in such cases is the value of the property at the time of the seizure with interest at the rate of six per cent per annum until the time of trial."

The statute, section 3854, Revised Statutes, is substantially the same as section 11, Revised Statutes 1855, page 1245, construed in *Pope v. Jenkins, supra*, and provides that "if plaintiff fail to prosecute his action with effect and without delay, and shall have the property in his possession, and defendant in his answer claims the same and demands

a return thereof, the court or jury may assess the value of the property taken, and the damages for taking and detaining the same, for the time such property was taken or detained from defendant until the day of the trial of the cause." The language, "for the time such property was taken or detained from defendant until the day of the trial of the cause," evidently relates only to the damages for the taking or detention. The jury nor court is required to ascertain the different values the property may have borne from the time it was replevied to the trial of the cause. The statute, as Judge Napton observed in Pope v. Jenkins, "gives to the party succeeding the choice of taking the property or its value. These terms are understood, therefore, to be equivalent, but they could not be so, if by the value of the property is meant its value three years perhaps before its assessment, or any other period during which the litigation has been progressing." Says the court in the same case. "The question to be determined here is not as to the measure of damages but as to the value of the property." And so it is whether plaintiff is in possession and fails in his suit, or defendant is in possession and fails in his defense. The court held the same rule applicable to either case. We are of opinion that the statute was properly construed in that case, and that the other cases herein cited and relied upon by respondent, confound the value of the property to be found and the damages to be assessed, and the learned judge who delivered the opinions overlooked the case of Pope v. Jenkins, and did not duly consider the provisions of the statute.

The judgment is reversed and the cause remanded. All concur, except Norton, J., absent.

Donnell et al., Appellants, v. The Lewis County Savings Bank.

Banking Corporation: POWER TO BORROW MONEY: CASHIER'S AUTHORITY. Where general banking powers are conferred by the charter of a banking corporation, the corporation may borrow money without having more specific authority therefor.

In order to show a cashier's authority to borrow money for his bank, it is not necessary to prove a power specially conferred upon him by the board of directors or a distinct ratification by them of the act after its consummation; his acts done in the ordinary course of the business actually confided to him as such cashier, are prima facie evidence that they fall within the scope of his duty.

- Promissory Notes. Where defendant's name appeared on a note
 in suit as indorser, but it was clearly shown that he was really the
 borrower of the money for which the note was given; Held, that
 an instruction which assumed that he was an accommodation indorser was error.
- 3. ——: NOTICE OF DISHONOR: ASSIGNMENT FOR CREDITORS: NON-RESIDENT CREDITOR. A bank of this State bound as indorser of a note payable in New York and held there, failed and made an assignment for the benefit of creditors. The note not being paid at maturity, the holder caused it to be protested and notice to be given to the bank, but not having heard of the failure and assignment, gave no notice to the assignee. Held, that the notice given was sufficient to bind the bank.
- 4. ____: ___. If one, whose name appears on a note as indorser, is really the maker, it is his duty to provide for its payment, and if he fails to do so, and the note goes to protest, he is not entitled to notice.
- t ——: CORPORATION. If a bank borrows money and gives its note therefor, the fact that its officers may have misapplied the money cannot defeat the holder's right to recover.

Appeal from Lewis Circuit Court.—Hon. John C. Anderson, Judge.

REVERSED.

Hagerman, McCrary & Hagerman for appellants.

David Wagner for respondent.

RAY, J.—This is a proceeding originally commenced before the assignce of the Lewis County Savings Bank for the adjustment and allowance of a claim in favor of plaintiffs—Donnell, Lawson & Co.—predicated upon a negotiable promissory note, of which the following is a copy:

"\$4,000. Canton, Mo. February 15th, 1877.

Ninety days after date I promise to pay to the order of
Lewis County Savings Bank \$4,000 at the banking house
of Donnell, Lawson & Co., New York City; value received.

H. Dayis.

Indorsed: Pay Donnell, Lawson & Co., or order.

Lewis County Savings Bank,
Per S. H. Stuart, President."

The assignee disallowed the claim, from which decision Donnell, Lawson & Co. appealed to the circuit court, where upon a trial anew before the court, a jury having been waived, a finding and judgment was again had and rendered against the plaintiffs, from which they have appealed to this court

The record shows that the Lewis County Savings Bank was a banking corporation organized and doing business as such at Canton, Missouri, under and by virtue of the General Statutes of Missouri, (1 Wag Stat., 329); that it commenced business in 1867, and continued until March 31st, 1877, when it suspended, and on April 7th, 1877, made a voluntary assignment in trust for its creditors; and that thereafter the assignee had charge of its effects under said assignment and the statute governing the same. 1 Wag. Stat., 150, 154. The record also shows that the plaintiffs at the same time were bankers in the City of New York, and the correspondents of the Lewis County Savings Bank in that city, upon whem said savings bank drew its drafts for eastern exchange, and to whom remittances were made to meet the same.

The record further shows that while said savings bank

was thus engaged in the banking business, to-wit, on November 7th, 1876, by its cashier, H. Davis, it addressed to plaintiffs, at New York, a letter to the following effect:

"We are furnishing our pork-packer here money on paper with margin put up to the amount of sixty cents on the dollar, and then when invested and cut we hold the entire product covered by insurance. With such paper as collateral could you discount our paper, from \$5,000 to \$20,000, at ninety days, and what at? Answer at once."

To which the plaintiffs, on November 13th, 1876, replied as follows:

We will let you have \$5,000 for ninety days, and beg to inclose herein a bank note, which you will please fill and forward to us for discount. This is the very best we can do at present, as the demand has been very general on us from our friends both west and south. Please have the note made by some private party and indorsed by the bank."

In response to this letter on the 18th day of November, 1876, the savings bank, by its cashier, H. Davis, forwarded to plaintiffs at New York a negotiable promissory note for \$5,000, at ninety days, made by its cashier, II. Davis, to said Lewis County Savings Bank, and indorsed to plaintiffs by said bank, by its president, S. H. Stuart. This note the plaintiffs discounted, and placed the proceeds to the credit of the Lewis County Savings Bank on its books; and subsequently such proceeds were checked out by said savings bank, and monthly statements of account were furnished said savings bank by plaintiffs. Afterward the said savings bank paid on said note \$1,000, and on February 15th, 1877, the note in controversy was given in renewal of the balance thereof and indorsed to plaintiffs by said savings bank, by its president, S. H. Stuart, as aforesaid. This renewal note was also discounted by plaintiffs, and the proceeds thereof placed to the credit of the savings bank on the books of the plaintiffs, and afterward checked out by defendant before its suspension. On the maturity of this renewal note, to-wit, on the 19th day of May, 1877, the

same was duly presented for payment, duly protested and notice thereof duly sent to the said Lewis County Savings Bank at Canton, Missouri. There is no evidence whatever showing or tending to show that plaintiffs, at or before the date of said protest and notice, had any notice of the prior assignment of said savings bank in trust for its creditors, as aforesaid. It further appears that said Stuart and Davis were the president and cashier of said savings bank, and that when, in the usual course of business, it became necessary to make indorsements, said president and cashier always indorsed the notes or drafts; that sometimes Stuart indorsed as president, and sometimes Davis as cashier; that prior to the indorsement of the note in question each of said officers had indorsed drafts to plaintiffs as such officers, and that plaintiffs and defendant, prior thereto, had a great many dealings with each other as such banks. It also appears that Davis, the cashier of said savings bank, on November 18th, 1876, was, on account of said \$5,000 note first made as aforesaid, credited on his account on the books of said savings bank with \$5,000, which he drew out from time to time before the suspension and assignment of the said savings bank, except \$1,000; but it does not appear that the plaintiffs had any knowledge whatever of this arrangement of the officers of said savings bank, by which such credit, use or misapplication of the funds of said savings bank were made.

The 1st section of the 6th article of chapter 37, regulating "Savings Banks and Fund Companies," (Wag. Stat., 329,) which may be regarded as the charter of the Lewis County Savings Bank, is as follows: "Any five or more persons, in any county in this State, may organize themselves into a savings association, and shall be permitted to carry on the business of receiving money on deposit and to allow interest thereon, giving to the person depositing credit therefor, and of buying and selling exchange, gold, silver, coin, bullion, uncurrent money, bonds of the United States, of the State of Missouri and of the city and county

in which any association shall be organized, of loaning money on real estate and personal security, at a rate of interest not to exceed ten per cent per annum, and of discounting negotiable notes and notes not negotiable, and on all loans made may keep and receive the interest in advance."

At the close of the testimony the court refused the following declaration of law asked by the plaintiffs, to-wit:

1. If the court, sitting as a jury, believes that Donnell, Lawson & Co. discounted and paid for the note of H. Davis for \$5,000, dated November 18th, 1876, to the Lewis County Savings Bank on the indorsement of said bank by the authorized officers, and the Lewis County Savings Bank received the money and used it for its banking purposes, and at the maturity of said note paid \$1,000 thereon, and Davis gave to said bank the renewal note in evidence for balance of said original note, which was indorsed to plaintiffs by said bank by its authorized officers and agents, and that said note was protested at the maturity thereof, plaintiffs should recover."

The following declarations were given by the court at the instance of defendant, to-wit:

1. That the bank, by its officers, had no right or power to borrow money, and no action can be maintained on such contract of borrowing.

2. That the bank cannot be held liable as indorser on the note sued on; that the president of a bank is not, by reason of his official position, presumed to have the power to bind it as an accommodation indorser of the note of an individual, and a payee who fails to prove that the president or officer had authority to make the indorsement, cannot recover against the bank.

3. If the court, sitting as a jury, find from the evidence that the bank closed its business on the 7th day of April, 1877, and made an assignment on that day, and that the assignee at that time took charge of its assets and was from thenceforth manager of its business, and that on the

19th day of May, 1877, the notary public, at the request of plaintiffs, mailed at New York City a notice of protest for non-payment of the note in controversy to S. H. Stuart, president, and no notice was sent to the assignee, then such notice was not sufficient to bind the bank as indorser, and the verdict should be for the defendant.

Exceptions were duly saved to these rulings of the court, and the same, together with the judgment thereon, are here assigned for error by the plaintiffs. The questions arising on this record, as indicated by the declarations of law given for the defendant, it will be seen, are three: 1st, Whether the Lewis County Savings Bank, under the general statute aforesaid, had power to borrow money. 2nd, Whether its president, as such, had authority to indorse its notes or drafts. 3rd, Whether the protest and notice of the note in question given to the Lewis County Savings Bank after its assignment, and while the assignee as such had charge of its affairs, but before the plaintiffs had any notice of said assignment, are sufficient to bind the defendant.

The two first of these questions may be taken and considered together, and both of them, as shown by the au-1. BANKING CORPO. thorities, have been expressly decided BATION: power to against the position taken by the defend-borrow money: against the position taken by the defend-cashier's authority. ant and held by the court below in its said In the case of Ringling v. Kohn, 6 Mo. App. instructions. 333, the St. Louis court of appeals had occasion to construe the 6th section of the act incorporating the "Peoples Savings Institution," (Sess. Acts 1857, p. 642,) which is substantially the same as the 1st section of the general statute above quoted, and under which the Lewis County Savings Bank was organized as aforesaid. The court there held, 1st, that: "Where general banking powers are conferred by the charter of a banking corporation, the corporation may borrow money without having more specific authority therefor. 2. In order to show a cashier's authority to borrow money for his bank, it is not necessary to prove a

power specially conferred upon him by the board of directors, or a distinct ratification by them of the act after its consummation; his acts done in the ordinary course of the business actually confided to him as such cashier, are prima facie evidence that they fall within the scope of his duty." These positions are well supported by the numerous authorities cited and relied on by the court of appeals in its well considered opinion in said case, and we think state the law correctly, when applied to the facts in this case, as well as to that. Curtis v. Leavitt, 15 N. Y. 9; The City Bank v. Perkins, 4 Bosw. 420; Barnes v. Ontario Bank, 19 N. Y. 156; Fleckner v. United States Bank, 8 Wheat. 357; Kimball v. Cleveland, 4 Mich. 606; Lafayette Bank v. State Bank, 4 McLean 208; Bank v. Wheeler, 21 Ind. 90; Robb v. Ross Co. Bank, 41 Barb. 586, and Wild v. Bank, 3 Mason 505.

The second instruction for the defendant is further objectionable in that it assumes that the Lewis County Sav-2. PROMISSORY NOTES. ings Bank was an accommodation indorser of the note in question. Such was not the fact. The real transaction between the parties, as clearly shown by the evidence, was a borrowing of money by the defendant from the plaintiffs, and while the transaction assumed the form of a negotiable promissory note, on which the savings bank appeared as indorser, it was in reality the maker of the note, much less an accommodation indorser, and got the proceeds realized thereby.

The third and last question has reference to the sufficiency of the notice to bind the defendant. The third s.—: notice of instruction given for the defendant in this dishonor: assignment for creditors: behalf, under the facts of the case, is clearly non-resident creditor. behalf, under the facts of the case, is clearly not the law. At the time of the protest plaintiffs neither knew nor had any reason to know of the assignment. There is no pretense that they were ever notified, and upon no principle of law can they be bound thereby. Bank v. Reynolds, 2 Cranch C. C. 289. They were residents of New York City, where the note was payable, and the assignment was made in Missouri, and under

the insolvent laws of this State, and hence could have no effect on foreign creditors. It has been settled by a long line of decisions that the State insolvent laws can only affect its own citizens and foreign creditors who have submitted to their jurisdiction. Baldwin v. Hale, 1 Wall. 223; Ogden v. Saunders, 12 Wheat. 279. At the time the note became due plaintiffs were not parties to the proceedings, and as far as the evidence shows had no knowledge of the assignment. It was then their right became absolute. As to this transaction they knew no one but the Lewis County Savings Bank. Such was the name of the indorser, if the defendant is to be treated as such; its liability was finally fixed; and the notice in question was sufficient.

On the other hand, if the savings bank is to be treated as the borrower of the money and the real maker of the .——:—— note, as the evidence clearly shows it to have been, then as such maker it was its duty to have furnished and kept on hand at the place of payment funds sufficient to have paid the same, or otherwise have provided therefor at its maturity; and this the evidence shows it failed and neglected to do, and in such cases all the authorities agree that no notice is necessary to bind the maker. Merchants Bank v. Easley, 44 Mo. 286; Harness v. Davies County Savings Bank, 46 Mo. 357; Daniel Neg. Inst., (1 Ed.) 1074.

If the savings bank was the real borrower of the money, as is conceded, or at least clearly shown, then the fact that 5.—:corporation. its officers may have used or misplaced the funds cannot defeat the plaintiffs' right of recovery, as in such case they were not bound to follow the money to see that it was applied to corporate purposes. Thompson v. Lambert, 44 Iowa 242; Mills v. Gleason, 11 Wis. 470; Merchants Bank v. State Bank, 10 Wall. 604; Lexington v. Butler, 14 Wall. 282; Ringling v. Kohn, 6 Mo. App. 333.

For these reasons the judgment of the circuit court is reversed and the cause remanded, to be proceeded with in conformity to this opinion. All concur.

The State v. Apperger.

THE STATE V. APPERGER, Appellant.

Intoxicating Liquor: INFORMATION: VARIANCE. Under Revised Statutes 1879, section 5459, permitting the maker of intoxicating liquor to sell the same, at the place where made, in quantities not less than one quart, but forbidding him to suffer the same to be drunk on the premises where sold, a conviction upon an information charging the sale of one pint without having a license as a dramshop keeper, is not sustained by proof of the sale of a quart, by the maker, at the place where made, and suffering the same to be drunk thereat. Suffering the liquor to be drunk at the place of sale is a distinct offense from the act of selling.

Venue. Where the bill of exceptions purports to preserve all the evidence, and fails to show that the offense was committed in the county charged in the information, the judgment will be reversed.

Appeal from Jasper Circuit Court.—Hon. M. G. McGregor, Judge.

REVERSED.

C. H. Montgomery for appellant.

There was no testimony introduced showing that the offense was committed in the county of Jasper or in the State of Missouri. The court is referred to a uniform line of decisions of this court.

D. H. McIntyre, Attorney General, for the State.

Section 5459, Revised Statutes, (in force at the time of this prosecution,) gives to manufacturers of intoxicating liquors the right to sell at the place where made in quantities not less than one quart, but expressly prohibits the drinking of liquor so sold on the premises where made. There are two offenses created by the above cited section: first, that of selling at the place where made in less quantities than one quart, and, second, selling in any quantity and allowing the same to be drunk on the premises. It would be better pleading in charging the last offense, to charge it

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in the language of the statute. But where the proof shows a sale by a manufacturer, and that he allowed the liquor to be drunk on the premises, it makes it an unlawful sale, and it is sufficient to charge it as a sale of intoxicating liquor without having a dramshop or any other license.

Martin, C.—The defendant was charged, by information before a justice of the peace, with the offense of unlawfully selling "intoxicating liquor in less quantity than one gallon, to-wit, one pint of beer without taking out or having a license as a dramshop keeper, or any other legal authority to sell." On appeal to the circuit court, the case was tried by the court, and the defendant was found guilty and fined \$40, from which action of the court he prosecutes

his appeal.

It appears from the evidence that the defendant was a manufacturer or brewer of beer; that at the time charged, he sold at his brewery a quart of beer for thirty cents, and that it was, after the sale, drank on the premises. The offense charged is not sustained by this evidence. He is charged with selling a pint. The evidence was that he sold a quart. The law in force at the time permitted him, as a manufacturer of intoxicating liquors, to sell in quantities not less than a quart at his brewery. R. S. 1879, § 5459. The same section declares that "the maker or seller shall not permit or suffer the same to be drank at the place of sale." This is a distinct offense from the act of selling. And although the evidence is clear enough that he permitted or suffered the beer sold by him to be drank at the place of sale, the information does not charge him with that offense; so that the evidence of it is irrelevant to the issue on trial. There is another fatal error in the proceedings.

The bill of exceptions, which purports to contain all the evidence at the trial, fails to show that the offense charged was committed in Jasper county, State of Mis-

souri. The judgment is reversed. All concur.

THE STATE, Appellant, v. JACKSON.

 Intermarriage between Whites and Negroes: constitution-AL LAW. The act making intermarriage between white persons and negroes a felony, (R. S., § 1540,) is no violation of the 14th amendment of the Constitution of the United States.

Neither is that clause of the act which provides that the jury trying a party accused of such a marriage, may determine the proportion of negro blood in either party to the marriage from the appearance of such person, a violation of that clause of section 53, article 4 of the constitution of Missouri, which provides that "the general assembly shall not pass any local or special law regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding."

2. ——: "The privileges and immunities of citizens of the United States" protected by the 14th amendment, are such as are secured to them by the Constitution of the United States and laws enacted in pursuance thereof, and the right of unrestricted marriage is not among these.

Appeal from Cape Girardeau Circuit Court.—Hon. D. L. Hawkins, Judge.

REVERSED.

D. H. McIntyre, Attorney General, for the State.

B. H. Whitelaw for respondent.

Henry, J.—At the May term, 1880, of the circuit court of Cape Girardeau county, the defendant, a white woman, was indicted for having intermarried with Dennis Jackson, a person having more than one-eighth part of negro blood. A demurrer was sustained on the ground that the law on which the indictment was based, section 1540, Revised Statutes 1879, is in conflict with the 14th amendment of the Constitution of the United States, as also with the 17th subdivision of section 53 of article 4 of the constitution of this State.

Section 1540, Revised Statutes 1879, is as follows: "No person having one-eighth part or more of negro blood

shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more of negro blood; and every person who shall knowingly marry in violation of the provisions of this section, shall, upon conviction, be punished by imprisonment in the penitentiary for two years, or by fine not less than \$100, or by imprisonment in the county jail not less than three months, or by both such fine and imprisonment; and the jury trying any such case may determine the proportion of negro blood in any party to such marriage from the appearance of such person."

We are unable to perceive any conflict between that section and the clause of our State constitution which declares that: "The general assembly shall not pass any local or special law regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding or inquiry before courts * *." It did not change the practice or jurisdiction or rules of evidence in any judicial proceeding or inquiry before any judicial tribunal. Besides, it is not a special or local but a general law, embracing all citizens of this State, white as well as black.

It may interfere with the taste of negroes who want to marry whites, or whites who wish to intermarry with negroes, but the State has the same right to regulate marriages in this respect that it has to forbid the intermarriage of cousins and other blood relations. If the State desires to preserve the purity of the African blood by prohibiting intermarriages between whites and blacks, we know of no power on earth to prevent such legislation. It is a matter of purely domestic concern. The 14th amendment to the Constitution of the United States, to which, by some, magical power is ascribed, has no such scope as seems to have been accorded to it by the circuit court. It declares that: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state where they reside;" and that: "No

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Every Chinaman, Indian and Hottentot born in the United States and subject to its jurisdiction, is, under the definition of a citizen, contained in the 1st section of the amendment, a citizen of the United States; and under the general, sweeping declarations of the latter clause of that section it is necessary to determine what are the privileges and immunities of citizens of the United States. They are those secured to them by the Constitution of the United States and laws enacted in pursuance thereof. All of one's rights as a citizen of the United States will be found guaranteed by the Constitution of the United States. If any provision of that instrument confers upon a citizen the right to marry any one who is willing to wed him, our attention has not been called to it. If such be one of the rights attached to American citizenship all our marriage acts forbidding intermarriages between persons within certain degrees of consanguinity are void, and the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother.

The act in question is not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violations of its provisions by white as by colored persons, and an act of congress interfering with such legislation and declaring that it should be lawful in Missouri for a black man and a white woman. or a white man and a black woman, to intermarry, would be without any binding force, because wholly unauthorized by any provision of the Constitution of the United States. In the Slaughter House Cases, 16 Wall. 36, the Supreme Court of the United States said with reference to the 5th section of the 14th amendment: "We doubt very much whether any action of a state, not directed by way of discrimination against the negroes as a class, will ever be held to come within the purview of this provision." In Minor

v. Happersett, 21 Wall. 162, that court held that "the 14th amendment of the Constitution of the United States does not add to the privileges or immunities of citizens but only furnishes additional protection for the privileges already existing," and neither in the letter nor spirit of the consti tution can a citizen find his right to intermarry with any one whom he may select who is willing to accept him The power of each state to regulate and control marriages within its jurisdiction, is as unquestionable as state sovereignty, and, as was observed by Buskirk, J., in the State v. Gibson, 36 Ind. 389; s. c., 10 Am. Rep. 42: "If the federal government can determine who can marry in a state, there is no limit to its power. It can legislate upon all subjects growing out of this relation. It can determine the rights, duties and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorces. It may assume, exercise and absorb all the powers of a local and domestic character. would result in the destruction of the states." 1 Bishop on Marriage and Divorce, (4 Ed.) § 87; State v. Kennedy, 76 N. C. 251; s. c., 22 Am. Rep. 683.

It was held in Burns v. State, 48 Ala. 195; s. c., 17 Am. Rep. 34, that a statute of that state imposing a fine upon a justice of the peace for solemnizing the rites of matrimony between a white person and a negro, was abrogated by the 14th amendment of the Constitution of the United States, but that decision is in conflict not only with the weight of authority on the subject elsewhere, but with a decision of the same court, reported in 42 Ala. 525, Ellis v. State.

If that amendment does not add to the privileges or immunities of citizens, in what other section of the constitution will the right of a white man to marry a negro woman, or a negro man to marry a white woman be found? Marriage acts similar to the one under consideration were in force in most of the slave-holding states prior to the adoption of the 14th amendment, and their validity was never questioned, (*United States v. Stanley*, 109 U. S. 3; s.

c., 22 Am. Law Reg. 790;) no one supposing that there was, prior to that amendment, any provision of the federal constitution with which they were in conflict, and it is only by ascribing to that amendment a force and scope expressly denied it by the Supreme Court of the United States that any ground exists for questioning their validity now. Nor is it one of the natural rights of man to marry whom he may choose. Under the Jewish dispensation persons nearly related by ties of blood intermarried, but in no Christian land are such marriages tolerated. The right to regulate marriage, the age at which persons may enter into that relation, the manner in which the rites may be celebrated, and the persons between whom it may be contracted, has been assumed and exercised by every civilized and Christian nation; and the condition of a community, moral, mental and physical, which would tolerate indiscriminate intermarriage for several generations, would demonstrate the wisdom of laws which regulate marriage and forbid the intermarriage of those nearly related in blood. It is stated as a well authenticated fact that if the isssue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments.

The judgment of the circuit court is reversed and the cause remanded. All concur.

MEIER, Appellant, v. Blume.

 Purchase with Notice: AGENCY. He who takes with notice of an equity, takes subject to the equity. Notice is not necessarily positive information brought directly home, but any fact that would put an ordinarily prudent man on inquiry, and a party will be as much bound by notice given to his agent as if it was given to himself personally; and the fact that the agent may be unable to read and write will be immaterial.

2. Married Woman: MISTAKE IN RED DEED CANNOT BE REFORMED. As against a married woman a court of equity has no power to compel specific performance, to reform a deed, or to do anything else which will divest title to land out of her. Hence, where there were two deeds of trust executed by husband and wife, and both intended to cover the same land, but by mistake the earlier deed described a different tract, and because the holder of the later deed had notice of the mistake the court decreed that the first deed should be reformed and enforced as a first lien against the true land; Held, that this decree was correct so far as it related to the husband's interest, but erroneous so far as it related to the wife's, and as to her interest the second deed must remain the first lien.

Error to Cole Circuit Court.—Hon. E. L. Edwards, Judge. Reversed.

Wm. S. Shirk for plaintiff in error.

Hamilton & Fisher for defendant in error.

Sherwood, J.—The petition in this cause in substance states that on October 1st, 1877, the defendants John B. and Dinah Blume borrowed of the plaintiff Meier \$1,000, and to secure its payment executed a mortgage on inlot 560 of the City of Jefferson, with the usual conditions; that default was made in the payment of the note and all interest, and prays a foreclosure of said defendants' equity of redemption, and that the property be sold for the payment of the debt and interest, etc.; that defendant Hackman claims some interest in said property adverse to plaintiff and the defendants Blume and Blume, and that plaintiff is informed and believes that on the 28th day of January, 1876, the defendants Blume executed a deed of trust to one Meyers as trustee of defendant Hackman to secure a debt on a lot of ground described in said deed of trust as lot 566, at the corner of McCarty and Mulberry streets, and that plaintiff is informed and believes that it was the purpose and intent of the defendant at the time to make said trust deed a lien on lot 560 at the corner of McCarty and

Mulberry streets, and that it was by mistake that the same was made to read lot 566 instead of 560; but at the time plaintiff made his loan and took his mortgage he had no notice or knowledge of said mistake, and no notice of any lien or incumbrance on said lot 560 in favor of said Hackman; that at the time plaintiff made his loan he employed and paid the recorder of land titles to examine the records and ascertain whether there was any incumbrance on lot 560, and said recorder informed him there was not; whereupon he took his said mortgage in entire ignorance of the mistake in Hackman's deed of trust. The prayer of the petition is in substance that plaintiff's mortgage be declared a prior lien on said lot to the equitable lien of Hackman's said deed of trust, and that the surplus arising from the sale of said lot 560 under plaintiff's mortgage over and above plaintiff's debt, interest and costs, be applied upon the debt of said Hackman.

The defendant Hackman, in his answer, after averring a want of knowledge as to the making of the mortgage to plaintiff, sets out the same facts substantially in relation to the making of a deed of trust by the Blumes to Meyers as trustee for him, and the mistake therein, and alleges that the mistake in describing the lot as number 566 was the mistake of the scribe or justice of the peace who wrote and filled out said deed of trust. The answer then proceeds to deny the allegation that plaintiff had no notice of the mistake and no notice or knowledge of the existence of any lien or incumbrance in favor of defendant on said lot 560, but alleges that plaintiff took his mortgage with full knowledge and notice of the mistake in Hackman's deed of trust, and with full and complete notice and knowledge of the existence of Hackman's prior lien on said lot 560. Judgment is then prayed that Hackman's deed of trust be reformed and corrected so as to read lot 560 instead of 566. and that it be declared the first lien thereon, and for further relief.

On the trial, the court having ruled that the burden

of proving that plaintiff had notice of Hackman's equitable lien was on the defendant Hackman, Hackman introduced in evidence his trust deed. He then introduced as a witness in his behalf the defendant John B. Blume, who testified in substance as follows: That he borrowed \$600 from Hackman; that he intended to secure it by a deed of trust on lot 560, corner of McCarty and Mulberry streets, but by mistake the lot was described as 566; that he never owned lot 566, and that lot was not at the corner of McCarty and Mulberry streets; that he afterward borrowed \$1,000 from Meier; plaintiff left it with his father, Louis Meier, with whom he dealt in arranging the matter; that he told the old man, Louis Meier, before the mortgage to the plaintiff was given, that "he had \$600 on it already," and the old man said: "I reckon that makes no difference;" that he said nothing to the old man about having given a mortgage or deed of trust on it, nor was Hackman's name mentioned, nor was lot 560 mentioned, and that he (Blume) did not then know that there was any mistake in Hackman's trust deed.

Plaintiff then offered in evidence his mortgage sued on, and then placed on the stand his father, Louis Meier, who testified in substance as follows: That plaintiff left the money for Blume (\$1,000) with him to give to Blume if the property was all right. As he and Blume came up to town to make the mortgage they talked about Blume's business, and Blume said: "I have some debts, amounting to about \$600, on the property." I said: "I reckon that makes no difference." He said nothing about a mortgage or deed of trust. That they went to Belch's office, and he, Louis Meier, went to the clerk's office to have the title examined; that Major Lusk, the clerk and ex-officio recorder, said to him: "No, there is nothing against lot 560. Here is a deed of trust to Hackman, but it is on lot 566, and does not affect lot 560;" that the witness thought that lot 566 was a lot Blume had owned in the same block; that he went back and told Mr. Fisher (who wrote the

mortgage) at Belch's office, that the lot was clear; that the mortgage was made and the money paid to Blume; that he had never heard of a deed of trust to Hackman before; and never heard of any mistake in his deed of trust until long after Blume got his money. Major Lusk, the recorder, testified substantially the same as Louis Meier. Plaintiff, in his own behalf, testified in effect that his father made the loan for him, that he never heard of a trust deed on the lot to Hackman, nor of any mistake in it.

Thereupon the court entered a decree substantially finding, as the facts on which it is based, the making of the deed of trust to Hackman; that the note and \$48 interest remain unpaid; that lot 566 was written by mistake in the mortgage for lot 560 by the scribe or justice who wrote it; that lot 566 is not on the corner of McCarty and Mulberry streets, and was never owned by Blume, but that lot 560 is on said corner and owned by the Blumes; that the mortgage sued on was made to the plaintiff, and the debt secured thereby and all interest is still due and unpaid; that plaintiff Meier, at the time and prior to taking said mortgage, had notice and knowledge of the mistake made in said deed of trust and full notice and knowledge of the existence of said lien in favor of the said J. G. Hackman on said lot 560; that each of said deeds are valid liens against lot 560, the said trust deed to Hackman being the prior lien to said mortgage to Meier, and orders the property sold, and with the proceeds Hackman's debt to be first satisfied and next Meier's.

I.

The finding of the circuit court that Meier, at the time he received the mortgage on lot 560, had notice that prior thereto Blume had executed a deed of trust on the same property to Peter Meyers as trustee for the benefit of Jno. G. Hackman, to secure a debt on Hackman for \$600, is fully warranted by the facts preserved in the record. Notice to the agent of plaintiff was notice to him, and he was

as much bound thereby as if such notice had been given to him personally. Hayward v. Ins. Co., 52 Mo. 181. He who takes with notice of an equity, takes subject to that equity. Gibson v. Lair, 37 Mo. 188, and cases cited. And the fact that plaintiff's agent, his father, could neither read nor write, does not affect the doctrine of agency or the doctrine of notice, in the smallest particular. "Notice in this connection does not mean positive information brought directly home to the party sought to be charged therewith and affected thereby; but any fact that would put an ordinarily prudent man upon inquiry is notice." Major v. Bukley, 51 Mo. 227; Beattie v. Butler, 21 Mo. 313; Vaughn v. Tracy, 22 Mo. 418; Speck v. Riggin, 40 Mo. 405; Muldrow v. Robison, 58 Mo. 331; Fellows v. Wise, 55 Mo. 413; Marsh v. Turner, 4 Mo. 253; Leavitt v. LaForce, 71 Mo. 353. Had the agent in this instance obeyed the dictates of ordinary prudence; had he followed the clue furnished him by the statements of Blume; had he put to the latter the most obvious of inquiries, the fact would at once have become apparent which before was only dimly and vaguely disclosed, that a prior incumbrance existed on the property sought to be incumbered for the second time. If this case disclosed but this single feature we should affirm the judgment of the circuit court; but another point remains for discussion, which will be briefly discussed in the next paragraph.

II.

If a married woman joins with her husband in the execution and acknowledgment of a deed conveying a certain tract of land in which she has the fee, or in which her husband has the fee and she has a right of dower, and by mistake the land is misdescribed, a court of equity possesses no coercive power, so far as concerns her, to compel specific performance, to reform the deed, or to do any other act or thing which will divest the title of the proper tract of land out of such married woman. Shroyer v. Nickell, 55 Mo. 264, and cases cited; 7 Cent. Law Jour., 182, and cases

cited; Atkison v. Henry, ante, p. 151. For this reason the decree of the court below went too far when in effect it reformed the deed of trust in favor of Hackman and against Mrs. Blume, and directed that such deed should have priority as to her interest over the mortgage executed by herself and husband to Meier which correctly described the land in controversy. So far as the defendant Blume is concerned the decree is correct, but so far as concerns his wife it is erroneous. The result is, that the plaintiff Meier acquired by his mortgage the exclusive right to foreclose the dower interest of Mrs. Blume in the land, and this regardless of all questions of priority and all questions of notice. Therefore judgment reversed and cause remanded. All concur.

THE CITY OF CHILLICOTHE ex rel. MATSON V. RAYNARD et al., Appellants.

- Public Porter: ACTION ON HIS BOND. A person whose baggage has
 been lost through the negligence of a public porter licensed by the
 city as such, may maintain an action on a bond given by him to
 the city pursuant to charter and ordinance for the faithful performance of the requirements of the ordinance and the safe delivery of
 all articles entrusted to his care.
- 2. Agent's Declarations and Verbal Acts. The declarations of an agent are admissible as evidence against his principal only when made while transacting the business of the principal and as a part of the transaction which is the subject of inquiry. Hence, where the baggage-master of a railroad company, while away from the baggage-room of the company and engaged in the transaction of his private business on his own premises, gave directions to a stranger with reference to the delivery of baggage; Held, that they were not binding on the company.

Appeal from Livingston Circuit Court.—Trial before J. H. Shanklin, Esq., sitting as Special Judge.

AFFIRMED.

Waters & Wyne for appellants.

R. R. Kitt for respondent.

Norton, J.—This suit was brought to recover the value of one trunk and contents charged to have been lost by the negligence of the defendant Raynard, who was employed to carry the same from the Wabash depot to the Hannibal depot in the city of Chillicothe. Relator alleged that Raynard was a public porter licensed as such, and gave bond with defendant Swetland as his security, conditioned "that said Raynard should conform to the ordinances of the city of Chillicothe in relation to porters, and safely deliver all articles entrusted to his care to the persons entitled to the same;" that relator delivered to said Raynard a trunk containing articles to the value of \$125, to be taken from the Wabash depot and delivered by him to the baggage-man at the Hannibal depot; that he failed to deliver said trunk, and that said trunk and contents have been lost to plaintiff. The answer of defendants denied relator's right to sue on the bond, and averred that relator employed Raynard to transfer his trunk from the Wabash depot to the Hannibal depot, and that said Raynard delivered the same to the baggage-man. On the trial of the cause plaintiff obtained judgment, from which defendants have appealed.

The evidence introduced established the following facts: that defendant Raynard, to whom a license had been issued by the city of Chillicothe as a public porter in said city, and who gave the bond in suit, was hired by relator to transport his trunk from the Wabash depot in said city to the Hannibal depot; that he took charge of the trunk and left it on the platform at the baggage-room door of the

Hannibal & St. Joseph Railroad depot, the door of which was at the time locked and the baggage-man absent. Defendant Raynard testified that he received from relator the check for his trunk; that he showed the check to one Cramer, who was the baggage-man of the Hannibal & St. Joseph depot, and told him he had two trunks to be transferred: that Cramer told him to set them down at the baggage-room door, and he would be there in a few minutes and take care of them; that he had to transfer them about 200 yards, and took both trunks and set them on the platform at the baggage-room door, which was locked; that at the time Cramer told him where to put the baggage, he, Cramer, was at his hotel or eating-house across the street, away from the baggage-room, at his own place of business. Two or three witnesses testified that they saw relator's trunk on the platform at the door of the depot with three or four others; that the baggage-room was half open; that the other trunks went on the train.

Upon the state of facts disclosed by the evidence the court gave the following instruction for plaintiff:

1. If the defendant agreed for hire to transfer the trunk in question from the possession and custody of the Wabash, St. Louis & Pacific Railway Company to the possession of the Hannibal & St. Joseph Railroad Company, at its depot in Chillicothe, and he failed to deliver the trunk to the baggage-man of said last named company at said depot, the finding ought to be for plaintiff.

The court gave for defendant the following instruction number one, and refused those numbered two, three, four:

1. If defendant Raynard undertook to transfer plaintiff's trunk from the Wabash depot to the Hannibal & St. Joseph depot in Chillicothe on the night in question, and if Raynard, under the direction of the baggage-man of said Hannibal & St. Joseph Railroad Company, on duty at its said depot in Chillicothe, placed said baggage at the door of the baggage-room of said depot, with other baggage in charge of said baggage-man, then defendant Ray-

nard was not liable for the loss or destruction of said trunk.

- 2. If defendant deposited the trunk in question, with another trunk, at the door of the baggage-room of the Hannibal depot, by direction of the baggage-master having charge thereof, and if the said baggage-master took charge of one of said trunks and sent it upon the Hannibal train passing east that night as baggage, and left the trunk in question upon the platform by the baggage-room door, from whence it was stolen that night, then the liability of the Hannibal road was fixed by the act and conduct of its baggage-man, and the finding should be for the defendant.
- 3. If the trunk in question, by the direction of the baggage-man at the Hannibal & St. Joseph depot, was placed at the baggage-room door in said depot with other baggage, and if said baggage-man took charge of such other baggage, and forwarded and cared for the same, and neglected to take care of the trunk in question, then plaintiff cannot recover of these defendants.
- 4. The defendants are not liable upon the bond in suit for goods lost in being transferred from one railroad depot to another.

It is insisted by counsel that the judgment should be reversed on two grounds: 1st, That defendants are not liable in this action upon the bond sued on for goods lost in being transferred from one railroad depot to another. 2nd, That defendant Raynard having deposited relator's trunk, with other trunks, at the baggage-room at the depot of the Hannibal & St. Joseph Railroad Company, by direction of the baggage-master of that company having charge of the baggage-room, the liability of the railway company became fixed as to relator's baggage.

We are at a loss to perceive the ground on which the first point is made. The city of Chillicothe had, under its 1. PUBLIC PORTER: charter, the power to "license, tax and regaction on his bond. ulate porters," and in pursuance of this power it passed an ordinance requiring public porters to

take out license, and also requiring them to wear a badge with the words "City Porter" thereon, and also requiring, as a condition precedent to the issuance of a license, that they should give bond in a penalty of \$200 for the faithful performance of the requirements of the ordinance and the safe delivery of all articles entrusted to their care. The right to sue on such a bond by any party aggrieved is given by sections 577, 580 and 590, Revised Statutes.

The second point made, we think, is equally untenable. The direction given to defendant Raynard as to what he 2. AGENT'S DECLARA- should do with relator's trunk by Cramer, ACTS. the baggage man while the baggage-man, while he was away from his post of duty, engaged in the prosecution of his own business, at his hotel or eating-house, could not, under the ruling of this court in the case of Adams v. Hann. & St. J. R. R. Co., 74 Mo. 554, in any manner bind the company, it having been held in that case that the declarations of an agent are admissible as evidence "only when made while transacting the business of the principal, and as a part of the transaction which is the subject of inquiry in the suit in which they are offered. What he may have said before the transaction is entered into or after its completion, is no more admissible than if made by a stranger." No evidence other than as above stated was introduced tending to show that the baggage-man either saw the trunk of relator, or that he could have designated or known that it was the trunk of relator, had he seen it on the platform where defendant left it in his absence, or that he took control of it, or that he knew or had the means of knowing that it was the trunk which defendant had deposited at the baggageroom door according to his directions.

The question as to whether or not defendant had delivered the trunk delivered to him for that purpose to the proper agent of the Hannibal & St. Joseph Railroad Company at its depot, was fairly submitted to the jury by the instructions given, and this question was the controverted School District No. 11 v. Lauderbaugh.

one in the case. For the reasons given the instructions two, three and four were properly refused.

Judgment affirmed, in which all concur.

SCHOOL DISTRICT No. 11 v. LAUDERBAUGH, Appellant.

- Mandamus: RES JUDICATA. When a legal liability has once been
 judicially ascertained, it will suffice, in a proceeding by mandamus
 to enforce it, to state that fact. The circumstances out of which it
 grows need not be stated.
- 2. Schools: DIVISION OF DISTRICTS. When a new district is formed, including within its limits those who have heretofore aided in the erection of a school house in the district from which they are detached, the tax authorized by section 7024, Revised Statutes, to raise a fund for the erection of a school house for the new district is to be levied upon the whole of the original district, and not on only so much of it as is left after taking off the new district.
- 3. Mandamus: AMENDMENT. In mandamus proceedings the court can grant no relief except what is specified in the alternative writ, and if not warranted in granting that must refuse any; but the writ is open to amendment.

Appeal from Jasper Circuit Court.—Hon. M. G. McGregor, Judge.

REVERSED.

Smith & Krauthoff with A. L. Thomas for appellant.

J. R. Shields for respondent.

Henry, J.—This is a proceeding by mandamus, in which an alternative writ was issued by the circuit court of Jasper county reciting all the allegations of the petition, and was as follows:

"State of Missouri.

To Isaac Lauderbaugh, Clerk of School District No. 1, Township 29, Range 32, Jasper County, Missouri: Whereas, it has been represented to our honorable cirSchool District No. 11 v. Lauderbaugh.

cuit court by petition of school district No. 11, township 29, range 32, Jasper county, Missouri, that at the March term of the circuit court of Jasper county, Missouri, a peremptory mandamus was issued by this honorable court and directed to Elbert Pinney, Isaac Lauderbaugh and Thomas Cone, trustees of school district No. 1, township 29, range 32, Jasper county, Missouri, commanding and requiring them, immediately on receipt of said writ of mandamus and without delay, to appoint a disinterested freeholder, non-resident of said district No. 1, to act as one of a committee of three to value and appraise the school property of said district No. 1, and report the same to the clerks of districts Nos. 1 and 11, so that said school property might be appraised and an amount assessed and collected from said district No. 1, and paid to said district No. 11, according to the pro rata share or interest said district No. 11 may have in said school property, etc.; And whereas said writ was duly served on the said directors of district No. 1, according to law, and in pursuance thereof, to-wit: on the 16th day of February, 1880, they appointed one William Hille to act as their representative in the premises; And whereas said district No. 11 had long prior thereto appointed one C. P. Ball to represent district No. 11, and said Hille and Ball, in pursuance of the order of this court and the statutes in such cases made and provided, did appoint one Isaac Johnson, duly qualified according to law, to act with the said Hille and Ball to appraise and assess said school property, in order that the proper amount should be collected off of school district No. 1 and applied to school district No. 11; and that in pursuance of said appointment, the said committee, Johnson and Ball, (Hille not acting.) met and made the proper estimate under the order of this court of the amount due to said school district No. 11 from school district No. 1, as aforesaid, and certified said amount so found by them to be due to the clerks of said districts on the — day of —, 1880; and that Isaac Lauderbaugh was at the time said sum was so

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certified, and now is, clerk of said district No. 1; and that said Isaac Lauderbaugh, though often requested by the directors of said district No. 11, to cause the amount then certified to him as clerk as aforesaid, to be levied on the property in said district, as is required by section 20 of the school law of this State in such cases made and provided. has refused, and still refuses, to perform his duty in the premises; and said petitioner (school district No. 11) is entirely without remedy in the premises unless it be afforded by the interposition of this honorable court; petitioner prays that a writ of mandamus issue against the said Isaac Lauderbaugh, clerk of district No. 1, township 29, range 32, Jasper county, Missouri, commanding him, as such clerk, to cause the amount certified to him by the committee aforesaid, to-wit: the sum of \$390.50, to be levied and collected off of district No. 1 and applied to the use of district No. 11, as required by law, and such other order be made in the premises as justice may require. Now, therefore, being willing that full and speedy justice be done in the premises, we do command you, the said Isaac Lauderbaugh, clerk of district No. 1, as aforesaid, that immediately on receipt of this writ, you so cause to be levied and collected off of school district No. 1, for the use of said district No. 11, the amount certified to you as clerk aforesaid, by the committee appointed by the order of this court, to-wit: Isaac Johnson and C. P. Ball, and amounting to the sum of \$390.50, or show cause at, etc., on, etc., why you have not done so."

On the day named, the defendant appeared and moved to quash the said alternative writ, assigning the following reasons: 1. The same was improperly and improvidently ordered by the court. 2. The said writ does not state facts sufficient to warrant its issuance or the relief prayed. 3. It does not appear from said writ that any obligation or duty was imposed by law on defendant to do the acts commanded. 4. It does not appear from said writ that defendant has failed to do any duty enjoined on him by law. 5. It does

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not appear that defendant is the clerk of any school district duly incorporated for school purposes. 6. It does not appear that any sum of money has ever been found due by competent authority from district No. 1 to district No. 11.

This motion was by the court overrued, and the defendant excepted, and declining to plead further, final judgment was rendered awarding a peremptory writ as prayed. The defendant, thereupon, having unsuccessfully moved to arrest the judgment, filed his bill of exceptions, and brings the case here by appeal.

The first point made by appellant in the brief filed is, that the murrer should have been sustained because the alternative writ does not specifically state relator's right to the remedy invoked, nor defendant's duty to perform the act demanded; that it is not stated how, or on what account district No. 1 became indebted to No. 11, nor why relator has any right to a provata share of the school property of district No. 1. To this the answer is, that the issuance of a peremptory mandamus in the original cause between the same parties was in pursuance of a judgment of the court, and the question of the indebtedness of district No. 1 to district No. 11, is resignalizata.

The aemurrer, however, should have been sustained, because the prayer of the petition and the command of the 2. SCHOOLS: division writ is, that the appellant, "immediately of districts." on receipt of this writ, cause to be levied and collected off of school district No. 1 for the use of district No. 11 the amount certified to you as clerk aforesaid, by the committee appointed by the order of this court, *

* amounting to the sum of \$390.50, or show cause," etc. Section 19 of the school law provides that: "When a new district is formed, which shall include within its limits those who have heretofore aided in the erection of a school house in the district from whence they were detached, and they propose to surrender to the old district all claim therein for their share of said property, this fact

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shall be distinctly stated in the notices posted in said district as required by section 18; but if such fact is not thus expressed in such notices, the property belonging to the district shall be valued as hereinafter provided, and there shall be levied upon, and collected from the taxable property included in the original district prior to such new formation a sum bearing the same proportion to the entire value of the school property, as the assessed valuation of the taxable property included within that portion of the territory detached, bears to the total valuation of the property located in the original district." R. S. 1879, § 7024. The manifest construction of this section is, that the sum is to be raised by taxation, not of the property of the old district after the detachment of a part to form the new one alone, but of the property included within the detached territory also.

While the writ might have been amended, as was held in the case of the State ex rel. Broadhead v. Berg, 76 Mo. 3. MANDAMUS: 136, yet, as defendant stood upon his demurrer, the court could not have, at that state of the proceeding, awarded a peremptory writ, because it would have been granting what respondent was not en-There is nothing in the petition or writ to show titled to. that the judgment in the original mandamus proceeding found that plaintiff had the right to have the whole amount charged upon district No. 1, as it stood after the detachment of that portion which in whole or part composed district No. 11. The court could grant nothing except what was commanded by the writ, and not being warranted in granting that, the demurrer should have been sustained. A mandamus proceeding cannot be used as a "drag-net." The party seeking relief by that proceeding must specify just what he wants, nothing more or less. Tapping on Mandamus, 324, 327; High on Extraordinary Remedies, § 548; State ex rel. v. Town of Pacific, 61 Mo. 158; State ex rel. v. Holladay, 65 Mo. 76; State ex rel. v. Kansas City, St. J. & C. B. R. R. Co., 77 Mo. 144. In Hartshorn v. Assess-

ors, 60 Me. 281, the supreme court of that state held that: "When a mandamus is awarded for purposes partly legal and partly not, the court will not enforce it by a peremptory writ limiting its effect, but will quash it, for though the court will for the purpose of justice mold the rule for the writ, yet it cannot mold the writ itself. The defendant is not required to look dehors the writ to ascertain his duty," and that "the greatest care is to be bestowed upon the proper framing of the mandatory clause, the rule being that the writ must be enforced in the terms in which it is issued or not at all." The right to amend under our statute is another question and is by no means inconsistent with the adjudications in this State and elsewhere, above cited, declaring that no relief can be granted except that specifically asked for.

The judgment is reversed and the cause remanded.

A'l concur.

WATT, Plaintiff in Error, v. Donnell.

- 1. Tax Deed: ADVERSE POSSESSION. A tax deed made under the Back Tax Act of 1877 is of no validity as against one who has acquired title to the land by possession and is in the actual occupation thereof, unless he is made a defendant in the tax suit.
- 2. EJECTMENT. Such a deed passes only the title of the defendant in the tax suit, and unless supplemented by evidence that he had some title will not authorize a recovery in ejectment.
- 3. ——: TAX BOOKS. The books in the collector's office are not records within the rule in Vance v. Corrigan, 78 Mo. 94, so that if the name of the defendant in the tax suit appears on those books as owning the land, he is to be regarded as the record owner.

Appeal from Jefferson Circuit Court.—Hon. L. F. Dinning, Judge.

AFFIRMED.

W. H. H. Thomas for plaintiff in error.

Dinning & Byrnes for defendant in error.

Philips, C.—This is an action of ejectment for the recovery of the possession of forty acres of land. The answer only claimed possession of a small portion of the forty acres inclosed, and as to the part so claimed it pleaded the statute of limitations as a bar to plaintiff's action.

The plaintiff claimed title through a tax deed executed in 1878 to the forty acres in question, including other lands. The record in the proceedings for the enforcement of the alleged tax lien shows that the suit was instituted against one Henry Whiten, as the owner of the land, who was a non-resident. Judgment was rendered on constructive notice by default. The evidence offered by defendant in support of the issue of adverse possession tended to prove that defendant's father had about seven or eight acres of this land inclosed with a fence, and cultivated the same for twenty years or more, claiming it as his own. The defendant testified that he, and his father before him as far back as he could remember, claimed the field in controversy; that they had it fenced and cultivated as their own; that his father cultivated the same up to the year 1857, when he conveyed all his lands to him (the defendant), since which time the defendant had every year continued to cultivate said field, claiming the same "as his own." On cross-examination, witness stated that they did not claim to have the "title" to the land, but had always claimed the land as theirs. They never had it assessed to them, nor paid any taxes One or more witnesses testified on behalf of plaintiff that they heard the defendant say he did not claim the land as his.

The plaintiff does not appear to have asked any instruction. The court gave the following instruction on the part of the defendant: "If the defendant, either in person, or in person and together with those under whom he

claims, have had the land in controversy fenced and in cultivation, and been in the actual, open, visible, adverse, notorious possession and occupancy of it for more than ten years consecutively next before the institution of this suit, claiming the same during all such time, with the intention of holding the same, then in such event the plaintiff is not entitled to recover." The court sitting as a jury found the issues for the defendant, and the plaintiff brings the case here on writ of error.

The position assumed by the plaintiff in error is, conceding the title of defendant by adverse possession, that the sheriff's deed under the tax sale passed the absolute title in fee to the land against all the world. The argument is, that by the terms of the statute the suit for the enforcement of taxes must be lodged against the owner of the land, and that such owner is as appears by record; and the learned counsel goes to the extent of saying that such record is "either the record in the recorder's office or the tax book in the collector's office."

The case of Vance v. Corrigan, 78 Mo. 94, is cited in support. This case must be considered with reference to 1. TAX DEED: adverse the facts at issue. It was a controversy possession. between the holder of the tax deed and the holder of the unrecorded deed. Both parties claimed title from the same grantor. The fact is distinctly stated in the opinion that neither Barnes, the original owner, nor Vance, the holder of the unrecorded deed, "ever had actual possession of the lot. There is nothing to show whether or not Corrigan had any knowledge or notice of the deed of Barnes to Vance or of the latter's ownership of the land." Manifestly there Barnes, whose title was of record in the recorder's office, was the apparent owner. The point decided was that the purchaser at the tax sale acquired the title as against the holder of the unrecorded deed not in possession. He was an innocent purchaser in such state of facts under the Registry Act.

The case further expressly decides that the purchaser

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at the tax sale takes the interest, and no more, of the de2.—: ejectment. fendant in execution in the land so sold. If the records of land titles at the time of the sale show him to be the owner, the purchaser acquires that apparent interest, whatever it is, provided he have not notice at the time of sale that such apparent owner was not the real owner. But the case of Vance v. Corrigan is not this case. There is nothing in the record before us to show that the man Whiten, whose interest was sold, ever had a shadow of title to the land in controversy. No record title or deed was offered or given in evidence at the trial to show that he was even the apparent owner; nor was it shown that he ever had possession of the land or asserted any manner of claim to it.

The suggestion that the books in the collector's office are such records as would come within the principle asserted a.—: tax books. in the Vance-Corrigan case is not to be entertained for serious discussion. It would be a monstrous proposition to assert in favor of the taxing power, under the statute in question, that because a judgment is rendered against A in a tax collector's suit, without more, it is conclusive evidence that A owned the land libeled. A legislative enactment compassing such a result would be violative of the fundamental law of the land as depriving the citizen of private property without the due process of law.

If, as a matter of fact, the defendant and those under whom he claims, had been in possession of the piece of land, in manner as alleged in the answer, for more than ten years, he was the owner in law of the land so occupied. A title by adverse possession as effectually vests the title in the occupant as if he had an unbroken title by deed. It may "properly be referred to as a source of title; and is really and truly as valid as a grant from the sovereign power of the state." Tyler on Eject., 88; Nelson v. Brodhack, 44 Mo. 600, and authorities cited. His long continued, open and notorious possession stands for notice.

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It is unnecessary, in this case, to pass upon the correctness of the declaration of law made by the court. Under the proofs the verdict was for the right party. The judgment of the circuit court is, therefore, affirmed. All concur.

THE AULL SAVINGS BANK, Appellant, v. Aull's Administrator.

- Landlord and Tenant: USE AND OCCUPATION. It is well settled law in this State that an action for use and occupation does not lie unless the relation of landlord and tenant, either express or implied, exists between the parties.
- 2. Deed: consideration clause: Parol Evidence. Where the grantor in a deed cont nued, after its execution and delivery, to use a part of the premises conveyed; Held, that parol evidence was admissible to show that this was part of the bargain; its effect was not to contradict the deed, but to explain the consideration clause, which is allowable.
- Implied promises. The law never raises a promise where the evidence shows the parties intended none.
- 4. Deed: CONSIDERATION CLAUSE: PAROL EVIDENCE. It is true that a reservation of an interest in real estate can only be made by deed; but if the parties agree that the grantor may continue to use the premises and he does so, this may be shown by parol in bar of an action for use and occupation.
- Practice: THE RECORD. This court will not reverse a judgment for refusal of the trial court to admit evidence, if it cannot determine from the record whether the evidence is material or not. See Bank of Pleasant Hill v. Wills, 79 Mo. 275.

Appeal from Lafayette Circuit Court.—Hox. Wm. T. Wood, Judge.

AFFIRMED.

At the trial of this case in the circuit court a witness for plaintiff was asked to state what George Wilson, then The Aull Savings Bank v. Aull.

deceased, had testified to in the probate court, where the case originated; but the court refused to permit him to do so. Plaintiff assigned this for error. The testimony which it was thus proposed to have rehearsed to the jury was not embodied in this record.

The fourth instruction referred to in the opinion, was as follows:

Real estate and the fixtures and appurtenances thereto belonging can only be sold and conveyed by deed, and all reservations of any interest in such property by the grantor must be made by and in the deed, and cannot be shown by parol; and if the jury believe from the evidence that the deed of conveyance of said real estate, banking house and fixtures by said Robert Aull, purports to convey the whole of such property, then no reservation of the use of any part of such property for the use and benefit of said Robert Aull or his agent can be shown by parol.

Wallace & Chiles for appellant.

J. D. Shewalter for respondent

Sherwood, J.—The plaintiff presented in the probate court for allowance against the estate of Robert Aull, deceased, a demand of \$1,639.04, for rent of office in the Aull Savings Bank building, and use of vault and safe from March 19th, 1874, to November 19th, 1878, at \$25 per month, payable monthly. The amount of the demand consisted in part of interest charged on each month's rent as it was alleged to have fallen due. George Wilson, the agent of Robert Aull, deceased, had for years occupied a desk and a portion of the space in the room or rooms in the bank building, and after the transfer of that building by decedent to the plaintiff, Wilson continued to occupy this desk, etc., transacting some business for Aull, but being also president of the bank and entitled as such to deskroom in the building. The transfer to the plaintiff occurred

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in March, 1874. No rent was ever charged on the books of the bank for Wilson's occupying the desk, etc. Nor was any rent ever demanded during the lifetime of Aull.

T.

It is well settled law in this State that an action for use and occupation does not lie unless the relation of landlord and tenant, either express or implied, exists between the parties. Edmonson v. Kite, 43 Mo. 176, and cases cited. In the present instance it is clear there was no express agreement for the payment of rent, and the fact that no rent was ever charged against Aull on the books of the bank, none ever demanded of Wilson, the agent, from the time of the transfer down to the time of Aull's decease in 1878, is so inconsistent with the ordinary course of business, if rent payable monthly was really thought of or claimed by the bank to be due, that these circumstances alone were entitled to considerable weight in determining whether any compensation for the space occupied was ever contemplated by the parties. The silence and acquiescence of the bank, its failure to charge, demand or receive rent during the space of more than four years, is evidence in and of itself that none was to be charged or that the matter had been otherwise arranged. Baile v. Ins. Co., 73 Mo. 371; 1 Greenleaf Ev., § 197.

II.

Objection is taken here, as below, to the admissibility of testimony to the effect that it was part of the consideration of the transfer that Wilson, the agent, was to continue occupying the desk, etc., in the bank building in winding up the business of Aull. This evidence was admissible. It did not tend to vary or contradict the deed made by Aull. The consideration clause in a deed can be explained or contradicted, since it occupies no higher plane than an ordinary receipt for money. Baile v. Ins. Co., supra, and cases cited.

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III.

The law never implies what the parties never intended; never raises a promise in such circumstances. Morris v. Barnes, 35 Mo. 412; Guenther v. Birkicht, 22 Mo. 439; Hart v. Hart, 41 Mo. 441. The instructions, as well for plaintiff as for defendant, put the law of the whole case, as already set forth, to the jury in the fairest possible manner, and neither party would have had any ground for complaint had the verdict been adverse to their claim. The jury have found that plaintiff is not entitled to recover, and this must be accepted as final.

IV.

Respecting the fourth instruction asked by plaintiff and refused by the court, it is enough to say that what it holds for law is at best but a mere abstraction. It is true a reservation of real estate can only be made by deed, nor did defendant claim otherwise. The question is not what the parties could do, but what did they do. If plaintiff, without a reservation formally made in the deed, granted to Robert Aull's agent certain privileges, such privileges as, according to John Aull, rightfully belonged to him and formed a part of the consideration for that deed, it is quite too late after years have gone by, after Robert Aull is in his grave, to raise the point now that the reservation of those privileges should have been made in the deed with all the formality incident to a technical reservation. Besides, this instruction ignores the theory of a parol license subsequent to the sale.

V.

It is claimed that error was committed by the trial court in refusing to permit a witness to testify as to what a deceased witness had testified to, on a former occasion, before the probate court. What the nature of that testimony was, whether material or immaterial, we are not informed. It is the duty of a party alleging error to establish

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it, at least prima facie. We shall not assume that the trial court erred unless it is made to appear.

For these reasons, judgment affirmed. All concur.

FIELDS V. THE WABASH, St. Louis & Pacific Railway Com-PANY, Appellant.

- 1. Railroads: KILLING STOCK: JUSTICE'S JURISDICTION. In determining whether the justice of the peace, before whom a suit under the 43rd section of the Railroad Law has been brought, is of the township where the cattle were killed, this court is not confined to the plaintiff's statement of his cause of action, but may look as well to the justice's transcript.
- 3. Practice: BILL OF EXCEPTIONS: INSTRUCTIONS. Where the petition sets forth a legal cause of action, and the evidence is not preserved in the bill of exceptions, but it is stated that the plaintiff introduced evidence tending to prove the allegations of the petition, and that defendant introduced no evidence, this court will presume that the evidence justified the trial court in refusing to take the case from the jury. And where, in such a case, an instruction appears in the record which authorizes the jury to find for the plaintiff without requiring them to find some fact legally essential to recovery, this will not be reversible error. When testimony is undisputed, an instruction may properly assume its truth.

Appeal from Daviess Circuit Court.—Hon. Jno. C. Howell, Judge.

AFFIRMED.

Wells H. Blodgett and Geo. S. Grover for appellant.

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Rush & Alexander for respondent.

Norton, J.—This suit originated before a justice of the peace, and upon a trial of the same in the circuit court, upon defendant's appeal, judgment was rendered in favor of plaintiff, from which defendant has appealed. The sufficiency of plaintiff's statement of his cause of action and the action of the court in giving and refusing instructions, are questioned by the appeal.

So much of the statement as is necessary to an intelligent disposition of the question raised, is as follows:

"Plaintiff says that on or about the 17th day of December, 1880, at the county of Daviess in the State of Missouri, and in Benton township, in said county, where defendant's road runs and passes through and along inclosed and cultivated fields, and where defendant was bound by the statute of Missouri to make, construct and maintain lawful fences and cattle-guards on and along the sides of its road, and where defendant had wholly failed to make, construct and maintain any such fences or cattle-guards, the defendant did, by its agents, cars and locomotives, on its said road and at the point aforesaid and kill one steer, the property of plaintiff, of the value of \$30, and did strike, wound and bruise one steer, of the value of \$30, injuring him to the amount of \$20 and plaintiff says the injuries aforesaid to his cattle were done and the damage aforesaid arose solely on account of the defendant's failure to make, construct and maintain lawful fences and cattle-guards, as required of it by law, as aforesaid, in and along the inclosed field aforesaid on the sides of its road." The statement concluded by asking judgment for double damages under the statute.

It is urged by counsel that the statement is fatally defective because it does not show that the suit was brought

1. RAILROADS: kill-before a justice of the peace of the townling stock: justice's ship where the stock was injured. If in determining this question we were confined to the state-

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ment alone, the objection would be well taken. not, however, restricted to limits so narrow, it having been held in the cases of Barnett v. Railroad Co., 68 Mo. 556, and Iba v. Railroad Co., 45 Mo. 469, that if it appear, either from the statement filed or from the justice's transcript, that the stock was killed in the township where suit was brought, it is sufficient. In the case last above cited it was said: "It has always been held that the proceedings of inferior courts should show jurisdiction; and though it were better in this case that it appear in the statement of the cause of action, yet if it were shown in the writ or transcript it would suffice." Under the principle of these cases we can resort to the transcript for the purpose of fixing the locus in quo of the justice who tried the case, and looking at it, it shows that he was a justice of the peace of Benton township, where the statement alleges the stock was injured.

It is also urged that the statement is insufficient because it does not aver that the stock got on the track of the road at a point where it was not fenced as required by law. While this averment is not made in the above form, we think it is in effect made by the allegation that the damages were "occasioned solely on account of the defendant's failure to maintain fences," as charged in the statement. It excludes every other implication than the one that the cattle got on the track where it was not fenced. Edwards v. Railroad Co., 74 Mo. 117; Bowen v. Railroad Co., 75 Mo. 426.

It is also objected that the court erred in refusing to give the instruction that under the pleadings and evidence 3. PRACTICE: bill of plaintiff could not recover, and that it also exceptions: instructions. erred in giving the following: "If the jury believe from the evidence that on or about the 17th day of December, 1881, at Benton township, Daviess county, Missouri, and at a point in said township where the defendant's railroad runs through and passes along inclosed and cultivated fields, and at a point where defendant had failed and

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neglected to make, construct and maintain fences on the side of its road, the defendant, by its agents, engines and cars, did strike, bruise and wound two steers, the property of plaintiff, and that such damage or injury was occasioned by the failure of defendant to construct and maintain its fence along its said road at said point, then the jury must find for plaintiff and assess his damages at whatever amount they may believe from the evidence the plaintiff has sustained by such injuries, not to exceed \$50."

The evidence is not preserved in the bill of exceptions. The only reference to it is that "plaintiff on the trial introduced evidence tending to prove the allegations contained in his statement," and that defendant introduced no evidence. And we are, therefore, justified in presuming that the evidence was sufficient to justify the court in refusing

to take the case from the jury.

The instruction given by the court, while it is subject to the criticism made, that it omits to tell the jury that they must believe that the stock got on the track where it was not fenced, yet still if the undisputed evidence in the case proved the allegation in the petition, that the failure to fence was the sole cause of the injury and damage, the omission to state such a fact and the assumption by the court that the fact was proved, is not reversible error. When testimony is clear and conclusive, an instruction may assume the truth of the fact sworn to, and it will not be reversible error. Earr v. Armstrong, 56 Mo. 577; Caldwell v. Stephens, 57 Mo. 589.

Judgment affirmed. All concur.

Bradford, Appellant, v. Floyd.

- Instructions: HARMLESS ERROR. This court will not reverse for an error in the phraseology of a single instruction, when it is manifest, taking it in connection with the issues made in the pleadings and all the other instructions, that the jury could not have been misled.
- 2. Texas Cattle: JUDICIAL NOTICE. The courts will not take judicial notice of the supposed fact that during a particular season of the year what are known as Texas cattle have some contagious or infectious disease, communicable to native cattle by contact. If this be a fact, it must be made the subject of proof.
- 3. Cattle Running at Large: DAMAGES. At common law it was the duty of every man to keep his cattle within his own inclosure. Failing to do so, he was liable for their trespasses upon the lands of others; and for any injury resulting from disease communicated by them, without regard to the question whether he was personally at fault, he was as much bound as if he had voluntarily permitted them to go at large. But in this State, in the absence of special stock laws, the common range is regarded as common property for the purposes of herding. The owner is not liable in damages for trespasses committed upon his neighbor's premises, except by breaking his lawful inclosure.
- 4. ——: COMMUNICATING DISEASE: DAMAGES. Before the owner of cattle running at large in this State, can be held liable for damages caused by disease communicated by them to other cattle, it must be shown that he knew his cattle were diseased; and this rule applies as well to Texas as to native stock.

Appeal from Jasper Circuit Court.—Hon. Joseph Cravens, Judge.

AFFIRMED.

Smith & Krauthoff with A. L. Thomas for appellant?

Phelps & Brown for respondent.

Philips, C.—This is an action for damages occasioned to plaintiff's cattle by contact with what are known as Texas cattle. The petition alleged substantially that in July, 1879, the defendant was the owner, etc., of a large

number of Texas, Mexican and Indian cattle, diseased and distempered with what is known as Texas or Spanish fever or some other infectious disease, and that defendant wrongfully and negligently failed and refused to restrain them, but negligently suffered them to go at large, off his land, upon the commons, where plaintiff's cattle ranged, and mingled with them, whereby nine head of plaintiff's cattle became infected with said disease and died, to his damage, etc. The answer was a general denial.

Plaintiff's evidence tended to show that defendant had about eighty head of cattle—one-third Texas and the rest Arkansas cattle; that in the summer of 1879 he suffered them to run on the common, where they mingled with plaintiff's cattle; that defendant's said cattle were infected with some contagious disease which was communicated to plaintiff's cattle, and nine of them died in the month of July. The defendant's evidence tended to prove that only nine of defendant's cattle were Texas cattle, and that they were sound and healthy when placed upon and taken off the range, and that the disease of which plaintiff's cattle died was not communicated by defendant's cattle.

On the part of plaintiff, the court instructed the jury that if they found from the evidence that the defendant was the owner of any diseased cattle, and suffered them to go at large, off his own land, upon the range, with the cattle of plaintiff, whereby plaintiff's cattle became diseased, they should find for the plaintiff; also, that the presence of Texas or Spanish fever among the native cattle of plaintiff, on the range with cattle of defendant, was prima facie evidence that the cattle of defendant were affected with Texas or Spanish fever. The plaintiff asked no other instructions.

At the request of the defendant, the court gave the following instructions:

1. The burden of proof is upon the plaintiff, and unless he has satisfied the jury that the cattle of defendant were affected with a contagious disease, which was com-

municated to the cattle of plaintiff, they will find for defendant.

2. Unless the jury find from the testimony that defendant's cattle had some contagious or infectious disease at the time they were placed upon the range, and also that it was communicated to the cattle of plaintiff, they will find for defendant.

The court, of its own motion, and over the objections of the plaintiff, gave the following instruction: "Plaintiff can only recover damages for injuries to such of his cattle as the evidence shows were injured or died from infectious disease contracted from defendant's cattle, while defendant's cattle were off the land where they belonged, unless the jury believe that the defendant's cattle were diseased Texas cattle, and as such communicated the disease to plaintiff's cattle, of which they died or were injured."

The jury found the issues for the defendant, and the plaintiff has appealed.

The giving of the second instruction on behalf of the defendant, is chiefly complained of by appellant. Had the linstructions: plaintiff otherwise shown a good cause of harmless error. Plaintiff otherwise shown a good cause of action in his petition and proofs, and to other instruction been given in the case, the second instruction aforesaid might have been objectionable as perhaps limiting the plaintiff's right of recovery to proof that the cattle were diseased at the time they were turned on the range. But taken in connection with the issues made in the pleadings and all the instructions given, it is manifest that the jury could not have been misled by it. And in such case this court will not reverse for an error in the phraseology of a single instruction. Nelson v. Foster, 66 Mo. 381; Blewett v. Railway Co., 72 Mo. 583.

The argument of appellant throughout is based on the assumption that the courts, even in the form of action adopted by the petition, will take judicial dicial notice. adopted by the petition, will take judicial cognizance of the fact that during the season of the year when the defendant's cattle were upon the

commons they possessed some contagious or infectious disease communicable to native cattle coming in contact with them; and, therefore, the defendant is liable for any injury resulting from such contagion, no matter whether he knew the particular cattle in question were so diseased or not. We know of no such established rule of law in respect of the so-called Texas or any other cattle. If we were to indulge in observations made in pais, or testimony delivered at nisi trials, or recur to current history and the reports of the national bureau of agriculture, it would be apparent that there is scarcely any subject about which there is such a diversity of opinion among practical cattle-men and scientists as that pertaining to the cause and character of the so-called Texas or Spanish fever in cattle, and especially as to its contagious and infectious properties, and the conditions under which native cattle will take it. Much seems to depend upon climatic influences, the seasons of the year and even the character of the particular season during which the disorder is supposed to be most infectious or contagious. The legislation of this State, based on the results of observation, indicates that in the opinion of the legislature such cattle, when brought into the State at certain seasons of the year, and after exposure for a time to our climate and food, lose the dangerous property of the disease. Whether such be the case or not, or whether and when the native exposed to the Texas cattle are liable to be affected, are in law disputable facts to be proved on the trial, as much so as any other issue tendered by the petition. This has been expressly so declared by the supreme court of Illinois, whose legislature and courts have had to deal with this matter practically. The act of her legislature assumed that Texas cattle, although free from disease, do communicate disease to native cattle. It was held that it was not a legal presumption that this theory was true. It is a question of fact to be determined by the jury. The act, say the court, makes the owner of Texas cattle liable for any damage resulting from disease communicated by them, but it does

not require a jury to believe without evidence, or that it is a recognized scientific fact that the disease is so communicated. *Davis v. Walker*, 60 Ill. 452.

By the common law it was made the duty of every man to restrain his cattle within the limits of his own inscattle response to the property of their trespasses upon the lands of others; and for any injury resulting from disease communicated by them, without regard to the question whether he was personally at fault, he was as much bound as if he had voluntarily permitted them to go at large. Cooley on Torts, 337. But in this State, in the absence of special stock laws, the common range is regarded as the common property for purposes of herding. The owner is not liable for damages for trespasses committed upon his neighbor's premises, except by breaking through his lawful inclosure. Gorman v. Pacific R. R. Co., 26 Mo. 445.

The Supreme Court of the United States in Railroad Co. v. Husen, 95 U. S. 465, followed by our Supreme Court cating disease: Urton v. Slowled Toward Co., 67 Mo. 323, and clared the acts of our legislature of 1871 and 1872 to be in conflict with the constitution of the United States, the only legislative act of the State applicable to the pleadings in this case, in force at the time of the injury in question, was section 6, chapter 6, page 135, Wagner's Statutes, as follows: "Every person shall so restrain his diseased or distempered cattle, or such as are under his care, that they may not go at large off the land to which they belong; and no person shall willfully and knowingly drive any diseased or distempered cattle, affected with what is known as Texas or Spanish fever or any other infectious disease, into or through this State, or from one part thereof to another, unless it be to remove them from one piece of ground to another of the same owner. Any person offending against this statute in either respect shall, on conviction thereof, forfeit \$20 for every head of such cattle and be liable for

all damages." From which it is apparent that it is only "diseased or distempered cattle" the owner or custodian is required to restrain and made liable for injury communicated by them.

The contention of appellant's counsel is, that Texas cattle are to be regarded and treated by the courts as vicious or dangerous animals, and the owner held liable for all damages done by them, whether or not the owner knew they were diseased, etc. As to domestic animals the common law does not affix any liability to the owner for damages inflicted by them when at large, on the ground of negligence, without proof that he knew the animal was mischievous or dangerous. Vrooman v. Lawyer, 13 John. 339; Dearth v. Baker, 22 Wis. 73; Cooley on Torts, 341, 343. The scienter should be averred and proved by the complainant. It is only in respect of animals ferae naturae, possessing certain universally recognized propensities, that the rule contended for by plaintiff applies. Crenshaw, 24 Mo. 199, 202. The section of the statute herein quoted in no wise altered the common law rule as to the scienter. Any other construction would be harsh and unreasonable. The section applies to any discased cattle, native as well as Texas. And, therefore, the averments and proofs should be the same as to Texas cattle as to the native.

It is quite obvious also, from the clause of said section respecting the driving of Texas cattle into or through the State, to subject the party to an action for damages he should know of the diseased condition of the cattle; for it says: "No person shall willfully and knowingly drive any diseased or distempered cattle," etc. It is not averred in the petition, nor proved at the trial, that the defendant had any knowledge whatever of the diseased condition of the cattle, if they were diseased.

The judgment was for the right party, and the same is affirmed. All concur.

NORTON, J., concurs in the result.

Atchison v. The Chicago, Rock Island & Pacific Railway Company.

Atchison v. The Chicago, Rock Island & Pacific Railway Company, Appellant.

- Transportation Contract: PARTY PLAINTIFF. Suit on a transportation contract is properly brought in the name of the consignor, whether he be the owner of the property or not.
- Negligence: EVIDENCE. In an action grounded on negligence, and alleging specific acts of negligence, evidence of other acts is inadmissible.
- 3. Transportation Contract: ACTION: NEGLIGENCE: EVIDENCE. In an action for a negligent breach of a contract to transport cattle, the petition alleged as acts of negligence on the part of the railroad company, defendant: (1) That it had had the cattle loaded into an unsafe car, so that they had to be taken out and loaded into another: (2) That the loading into this car had been negligently done. By the contract the plaintiff had expressly agreed to load and unload at his own risk. At the trial he gave evidence that the car into which the cattle were transferred was not provided with proper bedding. Held, that this evidence was incompetent, because: (1) If bedding the cattle was embraced in the term "loading," the plaintiff had assumed the risk of this; (2) If it was not, then the negligence shown did not fall within the allegations of the petition.

Appeal from Clinton Circuit Court.—Hon. Geo. W. Dunn, Judge.

REVERSED.

M. A. Low for appellant, cited Batterson v. Railroad Co., 13 N. W. Rep. 508; Waldhier v. Railroad Co., 71 Mo. 514; Luckie v. Railroad Co., 67 Mo. 245; Edens v. Railroad Co., 72 Mo. 212; Price v. Railroad Co., 72 Mo. 414; Bullene v. Smith, 73 Mo. 151, 162; Harrison v. Railroad Co., 74 Mo. 369; Marquette, etc., R. R. Co. v. Marcott, 41 Mich. 433; C. B. & Q. R. R. Co. v. Lee, 68 Ill. 576; Manuel v. Railroad Co., 56 Iowa 655; Field v. Railroad Co., 76 Mo. 614.

T. J. Porter and Roland Hughes for respondent.

Sherwood, J.—The petition in this cause was the following:

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Plaintiff states that defendant is a corporation, duly organized and operating under the laws of the State of Missouri; that defendant is a common carrier and running and operating a line of railway from Chicago, in the state of Illinois, through the State of Missouri and to the city of Leavenworth, in the state of Kansas; that as such common carrier, defendant agreed, for a reasonable consideration, to transport for plaintiff, on the 20th day of May, 1878, from Perrin, in Clinton county, Missouri, to Chicago, in the state of Illinois, two car loads of cattle, being live stock; that defendant, by its agents, servants and employes, negligently caused one load of said cattle to be loaded on and in a car which was defective and unsafe for the transfer of said cattle to their destination, so that said cattle had to be transferred and re-loaded; that defendant, its agents, servants and employes, so negligently transferred and re-loaded said cattle that by reason of the negligence of defendant, its agents, servants and employes, the said cattle were greatly damaged, to-wit, in the sum of \$146.30; that said damage was caused by reason of the defendant, its agents, servants and employes, negligently furnishing and causing said cattle to be loaded on and in a defective and unsound car, and by reason of the negligence of defendant, its agents, servants and employes, in re-loading and transporting said cattle; wherefore plaintiff prays judgment, etc.

The answer was a general denial.

I.

Atchison, the party in whose name the contract for the transportation of the cattle was made, was the proper party to sue, and the petition sufficiently shows that he was the consignor. Who the owner was, was immaterial. *Harvey v. Railroad Co.*, 74 Mo. 538.

II.

Testimony respecting the bedding of the car, was improperly admitted. There was no allegation in the petition Atchison v. The Chicago, Rock Island & Pacific Railway Company.

which warranted the admission of such testimony. The inadmissibility of evidence of this character, plainly appears by comparing the allegations of the petition with the evidence respecting the bedding of the car. See authorities cited by defendant.

III.

Again, under the terms of the contract, the defendant was not liable for any things connected with the loading or unloading of the cattle; for that contract expressly stipulates: "And it is further agreed that said party of the second part is to load and unload said stock at his own risk, the said Chicago, Rock Island & Pacific Railway Company furnishing laborers to assist, who will be subject to the orders of the owner or his agent, while in that service." All such risks as were attendant on loading or unloading the cattle the shipper explicitly assumed. By the plain terms of the stipulation quoted, all risks of the nature mentioned were assumed by the shipper, the defendant merely furnishing laborers to assist in loading and unloading, and those laborers, pro hac vice, were the laborers of the plaintiff, and subject to his orders. If, indeed, those laborers failed to obey his directions, complaint should have been immediately made to the freight conductor, or other person in charge of the train. But no directions appear to have been given, although it belonged to plaintiff's agent to give them, and to insist on their being obeyed. If then the alleged injury occurred because of negligently loading the cattle, this was a risk expressly assumed by the plaintiff; and if bedding the cattle was embraced in the term of loading the cattle, then the risk of their being improperly bedded was incident to and included within the former risk. If, on the other hand, bedding the cattle was not thus included, then the recovery of the plaintiff is based upon evidence broader than the allegations of the petition, and outside of those allegations.

Under this view it becomes unnecessary to consider the instructions given or refused.

Judgment reversed and cause remanded. All concur.

THE STATE V. McADOO, Appellant.

- 1. Druggist Selling Liquor: INDICTMENT NOT MULTIFACIOUS. An indictment in one count charged the defendant, a druggist, with unlawfully selling intoxicating liquor in a quantity less than one gallon, to-wit: one gill of whisky for five cents, one gill of brandy for five cents, one gill of wine for five cents, one gill of gin for five cents, and also with allowing the liquor to be drunk on the premises. Held, not multifarious.
- An indictment under the act of 1877, (Sess. Acts 1877, p. 342, § 1,) against a druggist for unlawfully selling intoxicating liquor, is bad unless it expressly avers that it was not sold for medicinal purposes.
- 3. ——: DRINKING ON THE PREMISES. The fact that liquor sold by a druggist is drunk by the purchaser on the premises, does not render the druggist liable to the penalties of this act, unless it is shown that the drinking was done with his knowledge and consent.

Appeal from Caldwell Circuit Court.—Hon. E. J. Broaddus, Judge.

REVERSED.

Crosby Johnson for appellant.

D. H. McIntyre, Attorney General, for the State.

Philips, C.—At the June term, 1879, the defendant was indicted for selling liquor as a druggist, and for permitting the same to be drunk on his premises. The indictment is as follows: "The grand jurors, etc., present that one James McAdoo, late of the county aforesaid, on or about the 10th day of June, 1879, at and within Caldwell county, being then and there a dealer in drugs and medi-

cines, then and there unlawfully did sell to one L. B. Clevenger, and divers other persons, to these jurors unknown, intoxicating liquors in a certain quantity less than one gallon, to-wit: one gill of whisky for five cents, one gill of brandy for five cents, one gill of wine for five cents, one gill of gin for five cents, without taking out a license as a dramshop keeper, and without having any license or legal authority to authorize him to so do, and did then and there unlawfully and willfully allow the said intoxicating liquors to be drunk upon the premises where it was sold, against the peace and dignity of the State."

To this indictment the defendant demurred for the reason that the indictment does not state facts sufficient to constitute an offense, because it does not aver that the liquor was not sold for medicinal purposes. The demurrer being overruled, he filed a motion to quash for the same reason, with the additional ground that the indictment is multifarious. This the court also overruled.

At the trial the State introduced said Clevenger as a witness, who testified: "About the 10th day of June, 1879, I bought a half pint of whisky from the defendant at his store in Hamilton. Defendant was a druggist. I told him I wanted it for medical purposes. I was sick at the time and my physician had prescribed whisky and rock candy. I so told defendant; drank some of the whisky on defendant's premises; got liquors there more than once; may have drunk some at other times on the premises. Crossexamined. Defendant did not give me any permission to drink on his premises; I did not ask his consent; went into the back room to drink; do not know that he knew I was drinking any there. He told me that I must not drink on the place, that it was contrary to law, and that he could not suffer it. I used the liquor as a medicine."

Defendant testified as follows: "I remember selling witness some liquor about the 10th day of June, 1879. He told me he was sick and wanted it for medicine. I did not know that he was going to drink it on the premises; spoke

of the law prohibiting its being drunk there, and said that I could not allow its being drunk there; don't know that any of it was used there; did not see Clevenger drink any of it. He may have drunk some of it, but if he did so it was without my knowledge or consent." This was all the evidence.

Defendant asked declarations of law as follows, all of which the court refused:

1. If the court finds from the evidence that the witness Clevenger, at the time he got the liquor of the defendant, represented that he was unwell and that he wanted the liquor for medical purposes, and that his physician had prescribed the liquor for his ailment, and defendant sold the liquor under said representations and for said purposes, the court cannot convict the defendant of having unlawfully sold the liquor.

2. Although the defendant may have sold the witness Clevenger liquor, which said witness drank on defendant's premises; yet unless the court finds that it was sold for the purpose of being drunk upon the premises, or unless it finds that the defendant gave his consent to its being drunk

on the premises, it will find for defendant.

3. Even if the liquor sold by defendant to the witness was drunk on defendant's premises in defendant's presence and with his knowledge, yet if the court finds that defendant remonstrated against its being drunk on his premises, the court will find for defendant, unless the court further finds that it was sold by defendant for the purpose of being drunk on the premises, or unless he gave his consent to the same being drunk there."

The court, sitting as a jury, found the defendant guilty and assessed a fine of \$40. From this judgment the de-

fendant appeals.

I. The indictment is not obnoxious to the objection of multifariousness. State v. McGrath, 73 Mo. 182; State v. Klein, 78 Mo. 627.

II. The indictment was drawn under section 1, Laws

of Missouri 1877, page 342. This section embraces two distinct offenses: one for selling intoxicating liquors in quantity less than one gallon, without taking out license as a dramshop keeper, "except for medicinal purposes;" the other for drinking intoxicating liquor on the premises where sold. Under an indictment properly drawn, a party may be convicted of either of these offenses. State v. Reiley, 75 Mo. 521; State v. McMurtry,* decided last term. The indictment is bad under the first ground mentioned in said section, for the reason that it does not negative the exception that it was not sold for medicinal purposes. State v. Brown, 8 Mo. 210; State v. McBride, 64 Mo. 364; State v. McMurtry, supra.

But the indictment is good in defining the offense of

drinking the liquor on the premises.

III. The fact that the court, after rejecting all the instructions asked by the defendant, found him guilty, would indicate that the court entertained the opinion that the offense under this section was complete, from the simple act of the purchaser of the liquor drinking it on the premises. The literal wording of the statute might give color to such a rigid construction. But it is not to be entertained that the legislature so intended. Such a construction would be violative of fundamental principles in our criminal jurisprudence. The intent—the motive—is the gist of the crime. A literal rendering of the statute would make a druggist liable for the misdemeanor, although he sold the liquor in good faith for medicinal purposes and forbade the party from drinking the same on the premises, but who, in spite of the protestation and in contempt of the positive mandate of the druggist, would drink in his house. The drinking on the premises, to constitute the offense, must be done with the knowledge and assent of the proprietor. This knowledge may be inferred from facts and circumstances, as the assent may be inferred from the fact of his knowl-

^{*}Not furnished the reporter for publication.

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edge and failure to prevent it. If the witnesses who testified in this case for the State, as well as for the defendant, are to be credited, and there is nothing in the record calculated to discredit the truth of their statements, the liquor in question was not drunk on defendant's premises with his knowledge or consent. If so, he was not guilty under the second assignment in the indictment.

The second instruction asked by defendant should have been given, or its equivalent, as indicated in the foregoing

opinion.

The judgment of the circuit court is reversed and the cause remanded for further proceeding in conformity with this opinion. All concur.

CLOTWORTHY V. THE HANNIBAL & St. JOSEPH RAILROAD COM-PANY, Appellant.

- Practice: DEMURRER. Where evidence is presented on both sides tending in any degree to establish the respective theories of plaintiff and defendant, it is error to take the case from the jury by instruction.
- 2. Railroads: NEGLIGENCE. If a train does not stop, an attempt of a passenger to get off would, perhaps, constitute such contributory negligence as would preclude a recovery. But, if it stops for a moment, or moves so slowly as to be almost imperceptible, it will be for the jury to say whether it is such negligence as will preclude a recovery.
- 3. ——: Where a train stops long enough for a passenger to conveniently get off, and, without the fault of the company's servants, he fails to do so, and the conductor, not knowing and having no reason to suspect that he is in the act of alighting, causes the train to start while he is so alighting, the company will not be liable.

Appeal from Macon Circuit Court.—Hon. Andrew Ellison, Judge.

REVERSED.

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Geo. W. Easley for appellant.

The demurrer to the evidence should have been sustained. Burrows v. Erie R'y Co., 63 N. Y. 556; Bonney on R'y Carriers, p. 132. Plaintiff's third instruction as to the measure of damages is erroneous. Thompson on Car. of Pass., § 23, p. 570.

W. H. Sears with Dysart & Mitchell for respondent.

The instructions taken as a whole are more liberal for defendant than authorized by law. Swigert v. Railroad Co., 75 Mo. 475; Straus v. Railroad Co., 75 Mo. 185; Kelly v. Railroad Co., 70 Mo. 604; Doss v. Railroad Co., 59 Mo. 27; Smith v. Railway Co., 61 Mo. 588; Barton v. Railroad Co., 52 Mo. 253. Plaintiff's instruction on damages correctly states the law. Whalen v. Railroad Co., 60 Mo. 323; 3 Sutherland on Damages, 259, 268.

Ewing, C.—Suit for damages for personal injury by being thrown from a car by negligent and careless starting of the train before plaintiff could get off. That the train stopped too short a time for plaintiff to get off safely. That as soon as the train stopped plaintiff, with all due diligence, proceeded to get off, but before she could reach the platform the train suddenly started, whereby plaintiff was violently thrown upon the platform, by reason of which carelessness, etc., plaintiff was "greatly wounded, bruised, hurt and made sick, as well as greatly frightened and terrified, and continues to suffer great pain and distress by reason of the wounds and bruises so received." The answer was a general denial after admitting the incorporation of the defendant. There was a verdict and judgment for the plaintiff for \$1,000, and the defendant appeals to this court.

The plaintiff asked three instructions, as follows:

1. If the jury believe from the evidence that the plaintiff was a passenger on defendant's cars, and that said

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cars were stopped at a station for the purpose of letting plaintiff and other passengers get off the cars, and that plaintiff proceeded to get off the cars when the train stopped, but that defendant's agents and employes started and put said train in motion before plaintiff had time to get off, and while she was in the act of getting off, whereby she was thrown down and damaged, then they should find for the plaintiff.

2. If the defendant's agents and employes stopped the train at a station, and plaintiff started to get off, then it was negligence in defendant to start said train before she

got clear of the cars, upon the depot platform.

3. In assessing the damages, the jury are not restricted to the mere pecuniary loss. They should take into consideration the age and situation of the plaintiff, her bodily suffering and mental anguish resulting from the injury received, the extent and permanency of her injury, and the extent to which she is disabled to make a support for herself and family, but in no case should the damage exceed \$5,000.

The court then, on its own motion, gave instructions four and five, to-wit:

4. If the jury believe from the evidence the plaintiff attempted to get off the train while it was in motion, then she was guilty of such negligence as to preclude her recovery in this action, no matter whether the train stopped at all, or only for a moment.

5. But if the jury believe from the evidence the train came to a full stop, and that while the plaintiff was in the act of getting off, without notice or warning, it started up before giving her reasonable time to get off, and injured her, then the jury should find a verdict for plaintiff.

The defendant offered no ovidence, and when plaintiff rested asked the court to instruct the jury that, "admitting all the evidence offered by the plaintiff to be true, the verdict must be for the defendant."

I. The appellant insists that the judgment must be

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reversed for failure to give this instruction. That the evidence shows that the train did not stop at all, and if so, the plaintiff was guilty of such contributory negligence as will preclude her recovery; or if it did stop, it stopped one minute, which was a sufficient length of time for plaintiff to get off safely. The evidence tends strongly to prove that the train did stop; that it came to a stand-still, but started immediately. One witness swearing that the conductor "jumped off with his face west, and he jumped off in a kind of a run and threw up his hands and hallooed 'all aboard.' At that time he was five or six feet west of her." This same witness also said he had seen the train stop there many times, and on this occasion "it did not stop the usual length of time." The evidence is somewhat conflicting as to whether the train stopped or not, but all agree that the halt or stop was a very brief and unusual one. There was ample evidence on this question to go to the jury, and the court did not err in overruling the demurrer. Kelly v. Hann. & St. J. R. R. Co., 70 Mo. 604; Cook v. Hann. & St. J. R. R. Co., 63 Mo. 398; Tutt v. Cloney, 62 Mo. 116; St. Vrain v. Columbia, etc., Co., 56 Mo. 590.

The first instruction given for the plaintiff is not objectionable. It fairly submitted to the jury the questions they were to consider. The fourth given on motion of the court is broader against the plaintiff than is warranted by the law. If the train did not stop at all, or make a halt, an attempt of a passenger to get off would, perhaps, constitute such negligence as would preclude a recovery. But if it stopped only for a moment, and was moving so slightly, as to be almost imperceptible, then it would be for the jury to say whether it was such negligence as would preclude a recovery. Straus v. K. C., St. J. & C. B. R. R. Co., 75 Mo. 185, and authorities there cited; Swigert v. Hann. & St. J. R. R. Co., 75 Mo. 475. The fifth instruction given on motion of the court is rather ambiguous. It ought to show more clearly that plaintiff proceeded to get off when the train stopped, and that reasonable time, under all the circumstances, was

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not given from the time the train came to a halt. These instructions are, perhaps, not fatally defective, but in the event of a new trial it would be well that the views of this court be understood. Swigert v. Hann. & St. J. R. R. Co., supra; Straus v. Kansas City, St. J. & C. B. R. R. Co., supra.

The second instruction given for the plaintiff is fatally defective. We understand the rule to be that "if the train was stopped a sufficient length of time for the plaintiff to conveniently alight, and without fault of defendant's servants she failed to do so, and the conductor, not knowing and having no reason to suspect that plaintiff was in the act of alighting, caused the train to start while she was so alighting, then the defendant would not be liable." Straus v. Kansas City, St. J. & C. B. R. R. Co., supra. The second instruction ignores these conditions altogether, but announces the broad doctrine that if the train stopped and plaintiff undertook to get off, it was negligence to start the train before she got off. This is not the law. This instruction must be qualified.

The judgment is reversed and the cause remanded for the error of giving the second instruction. All concur.

DICKSON V. ROUSE, Appellant.

- Taxes: COLLECTOR: SEIZURE. A collector can seize personal property by virtue of the tax-book and annexed warrant, commanding the collection of the personal tax appearing in the tax-book, although the latter may not conform to the law in containing upon its face a descriptive list of the personal property upon which the tax was claimed.
- 2. Collector: WARBANT. The tax-book and warrant having been delivered to the defendant as collector upon his accession to office, he having been appointed in the place of another who failed to qualify, the fact that the warrant itself was addressed to the latter does not affect the validity of the seizure and levy made by the defendant.

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Appeal from Hannibal Court of Common Pleas.—Hon. John T. Redd, Judge.

REVERSED.

Orr, Johnson & Foreman for appellant.

The list of taxable property is sufficient. R. S. of Ill. 1874, p. 870, § 78. The assessment having been made, the judgment rendered and the warrant being in the hands of the collector, it was his duty to execute it. He could not constitute himself a court of correction. The laws of Illinois provide a remedy for the assessed. Feisenthal v. Johnson, 104 Ill. 21. The warrant was not defective because there was no descriptive list in the tax-book of the personal property. Chinigny v. People, 78 Ill. 574. The warrant protected the collector just as an execution would a sheriff. Hill v. Figby, 25 Ill. 156; 23 Ill. 574; Herman on Execution, §§ 151, 152.

Thos. P. Gatts and Geo. A. Mahan for respondent.

Defendant was acting under the warrant addressed to Wm. Gatts and acted wholly without authority. Ill. St. 1874, chap. 120, §§ 132, 136; Ill. St. 1874, p. 883, § 153, also p. 879, § 133. The warrant must strictly conform to the statute and be fair on its face. Cooley on Tax., p. —. The tax-book was illegal, because it did not contain on its face a list or description of the property or any part thereof upon which the tax was claimed. Ill. St. 1874, chap. 120, § 123; Ill. St. 1874, chap. 120, § 25; Cooley on Tax., pp. 258, 259; 54 N. Y. 62; 15 N. Y. 316. Unless defendant can justify under his alleged warrant, he was a trespasser. Cooley on Torts, 461; 5 Wend. 240; 1 Otto 153; Cooley on Tax., p. 292. Plaintiff and his partner were doing business in Adams county, Illinois, and the cord-wood on which the tax was assessed could not be taxed in Pike county,

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Illinois, although situate in the latter county. Cooley on Tax., p. 271; St. Louis v. Ferry Co., 11 Wall. 423; Morgan v. Parham, 16 Wall. 471; 8 B. Mon. 1, 2; King v. McD., 31 Ill. 418; 14 Ill. 163. The assessment and levy was in violation of law. 81 Ill. 324.

Martin, C.—This was a suit before a justice of the peace to recover the value of a three-horse breaking plow. a two-horse cultivator and a double-hinged harrow alleged to have been wrongfully taken by defendant. The suit was dismissed by the justice for want of jurisdiction. On appeal to the Hannibal court of common pleas the case was tried by the court without the intervention of a jury. The defendant admitted the taking and carrying away of the property. He then proved that he was the collector of Levee township, Pike county, Illinois, and that in his capacity as such he seized the property in question in said township under and by virtue of the collector's tax-books of said township, and a warrant thereto annexed, commanding him to collect the personal tax appearing in said tax-books against plaintiff; that in pursuance with said authority the property sued for was seized and sold, and the proceeds applied to the payment of the tax.

It was objected at the trial that the tax-book given in evidence did not contain upon its face a descriptive list of the personal property upon which the tax was claimed, and that the book which constituted a part of his authority was for this reason not in conformity with the statute of Illinois, and, therefore, no justification for the levy. It was claimed by plaintiff that the collector's book should contain an enumeration or list of the different kinds of personal property possessed by the tax-payer as fully as given into the assessor by the tax-payer, and that the statement of the aggregate amount or value was not sufficient. In this case the statement was of an aggregate sum or value, and was not a statement of kind or quality in detail. The learned judge deciding the case seems to have given

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it a very deliberate investigation, which is evidenced by a written opinion copied into the record. The conclusion reached by him was that the books, by reason of the defect objected to, did not conform with the requirements of the statutes of Illinois, and that the defendant was without authority or justification in making the seizure. unable to agree with the learned judge in this conclusion. There was nothing in the books to show that the property so assessed and certified to the collector was illegally assessed, or that the tax or its valuation was not authorized by law. If it be true that the statute required the books to show the property of the tax-payer in detail, and the officers whose duty it was to make out and certify the books had departed from this direction, and entered the property in one aggregate sum or valuation, this, I think, would be only an irregularity which could not avoid the tax-book as a warrant of authority in the hands of the collector. It was, nevertheless, the genuine act of the officers who had full authority to make out and certify the books of warrant and seizure. It was a matter of which they had jurisdiction, and an irregularity of this character in the performance of that duty could not leave the collector without any authority of law. If his warrant of authority comes from the parties having jurisdiction to make and give it, he is protected by it, notwithstanding any irregularities or informalities appearing on the face of the assessor's or collector's books. Brown v. Harris, 52 Mo. 306; Rubey v. Shain, 54 Mo. 207.

I do not wish to be understood as holding that the statutes of Illinois require the statement in detail of the tax-payer's personalty to be extended in the assessor's or collector's books, as maintained by plaintiff and decided by the court below. I have examined the statute cited by counsel, and am satisfied that an extension in the total or sum aggregate, is all that is required.

It was objected by plaintiff that the warrant itself was addressed to William Gatts, collector of the township, in-

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stead of to the defendant as such collector. William Gatts had been elected collector, had taken the oath of office, but having failed to complete his qualification by furnishing the required bond, the defendant was appointed in his place. The tax-books and warrant had never been delivered to Gatts. Upon the defendant's accession to the office they were delivered to him. The learned judge deciding the case below held that the words "William Gatts" might be treated as surplusage, inasmuch as the law did not require the name of the collector to be inserted in the warrant at all. I am satisfied that the warrant was not void by reason of this irregularity. The books and warrant were delivered to defendant and constituted the first and only issue and delivery of them. The defendant was collector at the time of receiving them, and he answered the address of the warrant sufficiently to be within its protection. son v. Seavey, 38 Vt. 221.

As the evidence constituting the defendant's defense against the charge of trespass was of a documentary and legal character, and in all material matters of fact was not contradicted, I think he ought to be relieved from another trial in a foreign jurisdiction, by entry in his favor of the judgment which should have been entered at the trial. Accordingly the judgment is reversed and the cause remanded, and the court is directed to enter judgment for defendant. All concur.

Sherwood, J.—If the above is to be considered as indorsing the case of *Rubey v. Shain*, I am to be marked as dissenting, and refer to my individual opinion in the case of *Town of Warrensburg v. Miller*, 77 Mo. 61.

MATSON V. THE HANNIBAL & St. JOSEPH RAILROAD COMPANY, Appellant.

Railroads: KILLING STOCK: JURISDICTION. On an appeal from a justice of the peace, in an action for the killing of stock, the transcript must show affirmatively that the justice had jurisdiction. Where the transcript does not show that the animal was killed in his township, or the statement itself does not appear in the record, the judgment cannot be sustained.

Appeal from Livingston Circuit Court.—Hon. W. C. Samuel, Special Judge.

REVERSED.

Geo. W. Easley for appellant.

There being no statement of the cause of action in the record, it cannot be determined whether the justice had jurisdiction originally, or whether the circuit court acquired it on appeal. Thomason v. Railway Co., 74 Mo. 560.

R. R. Kitt for respondent.

Philips, C.—This is an action instituted in a justice's court in Livingston county, by respondent against the appellant, railroad company, to recover damages for the killing of plaintiff's cow. Plaintiff had judgment in the justice's court, from which defendant appealed to the circuit court, where the plaintiff again recovered judgment. The defendant has appealed to this court.

The transcript of the record does not contain any statement of the alleged cause of action filed by the plaintiff in the justice's court, nor is there in the record any other paper or admission to show that the justice had jurisdiction over the subject matter. It has been repeatedly held by this court that the transcript of the justice must show affirmatively that he has jurisdiction in such actions, by it appearing that the animal was killed in his township. And

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where the transcript does not show, and the statement itself filed with the justice does not appear in the record sent to this court, the judgment should be reversed. Barnett v. A. & P. R. R. Co., 68 Mo. 65; Thompson v. St. Louis, I. M. & S. R'y Co., 74 Mo. 560. It is quite probable that the statement was filed and sent up by the justice to the circuit court, but this court can only decide the case according to the record before us. Litigants and their attorneys should look after their records, and if incomplete, take the simple and appropriate steps for perfecting them.

Following the decisions of this court, the judgment of the circuit court must be reversed and the cause remanded.

All concur.

RAY v. Brown et al., Plaintiffs in Error.

Practice in the Supreme Court: BILL OF EXCEPTIONS. This court will not review a case, the record of which contains no bill of exceptions preserving the evidence and motions.

Error to Carroll Circuit Court.—Hon. E. J. Broaddus, Judge.

AFFIRMED.

Shewalter & Sebree and Mirick for plaintiffs in error.

Hale & Sons for defendant in error.

Ewing, C.—This is a proceeding in the nature of a bill in equity to foreclose or enforce an equitable mortgage. The defendant Brown filed his separate answer claiming title in himself by virtue of a sheriff's deed. The plaintiff moved to strike out that part of the answer, but the record does not show what disposition, if any, was made of the motion. The court below found for the plaintiff. There

is no bill of exceptions in the case preserving the evidence or motions, and, as has been repeatedly held by this court, the case cannot, therefore, be reviewed.

The judgment of the circuit court must be affirmed.

All concur.

RAY, J., not sitting.

MATHEWS V. THE CITY OF KANSAS, Appellant.

- 1. Mistake: RECOVENY. Ordinarily an action cannot be maintained upon the ground of plaintiff's mistake alone, unless the recovery which is sought would leave the defendant in statu quo, or unless defendant has been guilty of fraud, or misrepresentation, or would secure some unconscionable advantage by withholding the money.
- 2. ——: TAXES: COLLECTOR: PAYMENT ON WRONG LAND. Taxes on real property are assessed against the land, and not against the owner. When they become due, it is the duty of the owner to pay the tax assessed on the land as such, and where one pays the taxes on certain described land or lots designated by him as his, and requests and receives the receipt of the collector therefor, he cannot afterward recover the amount on the ground of mistake. It would be otherwise where the owner or his agent trusts to the collector to look up the numbers, which the collector undertakes to do, and furnishes the wrong numbers, and payment is made upon the belief of their correctness.
- 3. ——:——: The collector acts for the public in the collection of the revenue. The mistake of the tax-payer, himself, should not imperil this fund, and where one lies by for four years after making such mistake before demanding a rectification, he should, at least, come with clearest equity.

Appeal from Jackson Circuit Court.—Hon. S. H. Woodson, Judge.

REVERSED.

R. H. Field with Wask Adams for appellant.

There was mistake on the part of respondent only in

paying the taxes, and none on the part of appellant in receiving them. If appellant should re-pay the taxes, it cannot be placed in statu quo as to the taxes against the lots. and the judgment should be reversed. Jiska v. Ringold Co., 57 Iowa 630; Laws of Mo. 1875, § 27, p. 226; U. S. Bank v. Bank of Ga., 10 Wheat, 333, 358; Boas v. Updegrove, 5 Barr 516; Guild v. Baldridge, 2 Swan (Tenn.) 303; Story Eq. Jur., §§ 147, 148; Cooley on Tax., 567; Taylor v. Commissioners, 3 Pen. & Watts (Pa.) 112; Espey v. Allison, 9 Watts 462. There was no mutual mistake, and it is only in such case that the legal right of restitution prevails, regardless of where the loss falls. Duncan v. Berlin, 5 Rob. (N. Y.) 468; Paulison v. Van Iderstine, 28 N. J. Eq. 306; Luddington v. Ford, 33 Mich. 123; Evarts v. Stegar, 5 Ore. 147; 71 Mo. 563. The taxes were a charge only against the lots, and it was no concern of the collector to whom they belonged.

Lathrop & Smith for respondent.

If the evidence establishes a mutual mistake of fact, respondent is entitled to recover. Koontz v. Bank, 51 Mo. 275; Harris v. Board of Education, 3 Mo. App. 570; Budd v. Eyermann, 10 Mo. App. 437; Allen v. Mayor, 4 E. D. Smith 404; Deitrich v. Mayor, 5 Hun 421; Rheel v. Hicks, 25 N. Y. 289; Kingston Bank v. Eltinge, 40 N. Y. 391; Mayer v. Mayor, 63 N. Y. 455. The fact that the taxes were a charge against the land does not affect the case. And, even if the purchaser of the lots applied to the collector and was informed there were no delinquent taxes against them, still the plaintiff would be entitled to recover. Raley v. Guinn, 76 Mo. 263, 275.

Philips, C.—This action was begun in March, 1879, by respondent, Mathews, against the appellant, the City of Kansas. The petition alleged in substance that in January, 1875, the plaintiff was owing to the defendant taxes for the year 1874, assessed on certain lots of the plaintiff in said

city; that his agent, Harriman, for him, went to the collector's office, in said city, in January, 1875, to pay the taxes, and by the mutual mistake of the parties the said agent payed tax on other lots not belonging to plaintiff, which sum so paid he seeks to recover back. The answer is a general denial.

The plaintiff's evidence was to the following effect: "That respondent had a map containing a list of lots in the corporate limits of appellant, in King & Bouton's addition; that on this map were certain marks or characters which indicated the lots belonging to him; that this map was left with his brother A. B. Mathews or D. O. Smart, his banker, for their guidance in ascertaining his lots for the purpose of paying the taxes thereon; that his said brother procured Harriman in January, of the year 1875, to pay the taxes due appellant on respondent's lots; that Harriman then went to Smart, the banker, for a list of respondent's lots to pay the taxes due on same; that by his or Smart's mistake, or both, the list of lots taken from said map were not those belonging to respondent; that Harriman took the list of lots so taken by mistake and gave it to appellant's collector, and told him to make out a receipt for the taxes due appellant upon said list of lots, and to make out the receipt to respondent as owner thereof; that the collector made out the receipt accurately as directed; that it contained the lots and only those on the list given him by Harriman, as aforesaid; that this mistake was not discovered until sometime in the year 1878, when the respondent found that the taxes which he intended to be and thought were paid, as aforesaid, were then still delinquent; that he has, since 1878, paid the taxes so due upon his lots, and that he demanded of appellant's common council the re-payment of the taxes so paid by Harriman under mistake, but appellant had failed and refused to re-pay them. Respondent admitted at the hearing of this cause, (as appears in the bill of exceptions,) that the taxes so paid by mistake were in the 1874 land tax-book of appellant entered

paid on date of payment, and that they never had been carried forward upon any subsequent tax-book; that these lots so paid on by mistake had changed hands since said payment and before the discovery of the mistake herein, and that they have not since discovering said payment was a mistake, belonged to the same parties who owned them at the date of such payment."

Defendant, at the close of plaintiff's evidence, demurred The court refused the instruction. thereto. then introduced as a witness the collector, who testified substantially that he did not pretend to know who was the owner of real property on which taxes were assessed; that it was not the custom in the office in receiving taxes to make inquiry who is the owner; the taxes upon real estate being against the land itself, the receipts are made out to those paying in whosever name the party paying directs. In this particular case Harriman paid this tax. Witness did not remember that Harriman told him whose property it was, although he may have done so; that he did not care to inquire or know. On cross-examination he stated that he knew that Harriman was a tax-paying agent, and that he was in the habit of giving receipts to such agents in the name of the owner when known: that Harriman must have given him the name of Mathews as the party in whose name the tax receipt was to be made out, and he so made the same in the name of Mathews as owner of the property described in the receipt.

The defendant again requested the court to instruct to the effect that under the evidence plaintiff could not recover. This the court again refused.

The plaintiff asked no instruction. The defendant requested the court to give the following declaration of law: "If the court believes from the evidence that the witness Harriman, or other person for plaintiff, intending to pay taxes due defendant upon certain lots belonging to plaintiff, but by mistake paid taxes to defendant upon other and different lots which did not belong to plaintiff instead,

without the fault or mistake of defendant, then plaintiff cannot recover back the taxes so paid, or any other amount, unless the court believes from the evidence that the defendant will not suffer the loss of such taxes." The court refused to give this instruction, and thereupon found the issues for the plaintiff and rendered judgment accordingly. From which defendant has appealed to this court.

It is rendered in a measure unnecessary to discuss the rights of a party to recover on a mistake committed solely by the actor, for the reason that the basis of recovery assumed in the petition is the mutual mistake of the parties. Ordinarily, when recovery is sought on the ground of complainant's mistake alone, the action is not maintainable if the defendant would not be left in statu quo, or unless he had been guilty of some fraud, misrepresentation or would secure some unconscionable advantage by withholding the money. In the instance of a mutual mistake the party paying thereunder may ordinarily recover without regard to the special equities involved as to where the loss will fall. In such case it is mainly a question of fact. The inquiry is, were both parties in error as to the real facts, and did both act thereon? The answer to this question controls the issue. Waite v. Leggett, 8 Cow. 195; Kingston Bank v. Eltinge, 40 N. Y. 396; Koontz v. Cent. Bank, 51 Mo. 275. Thus restrained by the pleadings, the question is chiefly one of fact. The facts in this record are quite clear and undisputed. Do they establish a mutual mistake or tend thereto? That the agent Harriman was under a misapprehension as to the lots on which he made the payment, is palpable enough. But I am unable to discover any mistake on the part of the collector representing the city. To rightly estimate and interpret the action of the collector in this transaction, regard should be had to the law under which he was acting. He was not acting sui juris but virtute officii. He was acting under a special statute which defined his duties, directed his acts and limited his powers. In contemplation of law, this was known to the agent,

Harriman, in dealing with the collector. Under the statute then in force the assessment of taxes on real property was not a personal tax against the owner. The assessment was made on the land itself by its numbers, regardless of who was its owner. It was not the duty of the collector to look up the owner or apply to him for the taxes. The tax by law became due and payable at certain prescribed periods, and it was the duty of the owner to go to the collector, or send some one, and pay this tax assessed on the land as such. So the collector in his testimony but stated a legal truth in saving that he had no concern as to who was the owner of a given lot or tract of land. He was receiving the tax imposed on the given lot as such. It may be conceded that if Harriman had gone to the collector and stated that he had come to pay the tax assessed on plaintiff's land, trusting to the collector to look up the numbers, and this the collector undertook to do, and furnished the wrong numbers, and the agent had thereupon made payment on the belief of the correctness of the lots, this would have been a case of mutual mistake, or at least one in which the plaintiff would have a clear equity of restitution. But the proof here is that without any word or act of the collector inviting thereto, the agent of plaintiff, not depending on the collector for the land assessed against his principal, presented his own prepared list to the collector "and told him to make out a receipt for the taxes due upon said list." In such a case the collector had to look simply to the numbers of the lots thus furnished to ascertain the amount of taxes assessed thereon. This he did as invited by the plaintiff, and received the money without question, as it was due the city. Where is the evidence in all this to give color even to any mistake or misrepresentation as to any material fact on the part of the collector? He was pursuing the statute receiving the tax due on the lots as such, regardless of who the owner was. The money received was justly owing to the city, was a charge on the lots, and,

therefore, it cannot be affirmed that it is unconscionable for the city to hold it.

Counsel refer us to a number of authorities to support the judgment of the court below. But an examination of them discloses the fact that the mistake in question there was mutual, or the payment was demanded or invited, or induced by some act or word of the party to whom payment was made. Such was the case in Griffith v. Townley, 69 Mo. 13. The case of Koontz v. Bank, supra, clearly presented the question of a mutual mistake with the additional element that the bank presented the draft making

demand of payment on the wrong party.

In Allen v. Mayor of N. Y., 4 E. D. Smith 404, it is to be observed that the owner of the lot was notified by the defendant corporation that the assessment had been made on his lot. The court, in the course of the opinion, say: "The mistake and belief were induced by the acts of the defendants themselves, the very parties who have authority to lay assessments, and who did lay the assessment therefor referred to, and who, therefore, knew what lots were affected thereby." Even there the court was divided in maintaining the action. Likewise in Dietrich v. Mayor, 5 Hun 421, the same fact in principle existed. The plaintiff presented to the water or tax commissioner the proper receipt or certificate and asked for the bill of taxes imposed upon that lot, and no other. The mistake was that of the clerk in giving her the bill on another lot. Under such a state of facts, the court very properly held that "she had a right to assume, under the circumstances, that her bill was in all respects correctly prepared, and that the only duty left undischarged was the payment of the sum set down as the tax imposed." This was clearly the instance of a mutual mistake primarily caused by the party sought to be charged. So in Rheel v. Hicks, 25 N. Y. 289, the plaintiff was induced to pay the money upon the express representation made to him that he was the father of an unborn bastard child. The woman proving not to be preg-

nant, he was clearly entitled to restitution for the money so paid. The case rested on the mutuality of the mistake.

The case of Kingston Bank v. Eltinge, supra, goes to great length in permitting the recovery where the money was paid under an execution sale. If the precise question were presented for decision here, I could not follow it. Though for the purpose of this case it is enough to say both parties there were, perhaps, under a mistake as to facts, and the majority of the court placed their decision

upon that ground.

Mayer v. Mayor, 63 N. Y. 455, presents as strong a case for the respondent as I have found. The plaintiff was the owner of lot 28 on which there was an assessment for paving the adjoining street. There was a like assessment on lot 27 lying along side of lot 28, but not owned by complainant. But it is to be observed as the initial cause of the trouble, that the city, through its appropriate officer, notified the complainant of the assessment on lot 27, "stating the making of the assessment thereon, the amount, and that payment of the assessment would be expected by a time specified." On receipt of this notice he presented it to the collector and paid the assessment; and soon discoving the mistake, demanded rectification. Recovery might, perhaps, have been sustained on that state of facts, on the ground of mutual mistake, for the city had, through its mistake in the first instance, induced the error on the part of the complainant. The learned judge who delivered the opinion seems to have treated the case as if the mistake was that of the plaintiff alone, and, therefore, as it did not appear that the city had altered its condition in consequence of the payment on lot 27 instead of 28, and would, perhaps, suffer no loss by making restitution, it was a proper condition of affairs for an application of the rule that the loss should fall on him who first occasioned the mistake. If the principle invoked in that case were applied to this, the plaintiff could not recover. For it is apparent, both from the facts proven at the trial as also from inferences proper

to be drawn from the known provisions of the revenue law, both municipal and state, that the defendant's condition and rights toward the lots on which plaintiff, by his own mistake, made payment, were thereby entirely changed at the time this action was brought. The taxes were marked paid on the tax-book. They were not carried forward in the following tax years; they were not declared delinquent, and passed in the meantime into the hands of other parties. Whether the taxes might be enforced yet, or whether the property had passed into the hands of innocent purchasers. are questions, perhaps, not so presented in this record as to be accurately determined in this controversy. But enough is fairly inferable from the record and the known operation of certain provisions of the revenue laws; to indicate that an attempt of the city to enforce the collection of what would have been its dues but for the mistake of plaintiff's agent, would be attended with litigation of most doubtful issue. Jiska v. Ringgold Co., 57 Iowa 630; Guild v. Baldridge, 2 Swan (Tenn.) 295.

The supreme court of Pennsylvania through so eminent a jurist as Gibson, C. J., held that where a terre tenant paid off an execution under a mistaken apprehension that it was a lien on the land, the plaintiff in the execution could retain it. It was not unconscionable in him to retain it, because the money was justly due on his judgment and there was no mistake committed by the party receiving the money. To entitle a party to recover money under such circumstances the receiver must be placed in the same position he was in at the time of payment, and if delay in cohecting his dues would ensue, the party causing it by his mistake must bear the loss. Boas v. Updegrove, 5 Barr 516; Espy v. Allison, 9 Watts 462.

II. There is this further consideration of much weight in the determination of this case. The collector in such matters is acting for the public. The constituency are deeply concerned in the prompt collection of the revenues. The healthful maintenance and efficiency of the local gov-

ernment depend in large measure upon the timely collection of its revenues. The mistake of the tax-payer himself ought not to imperil this fund. Such property in our growing communities is constantly changing ownership. The collector's books are the sources of information, not only to the public dealing with the property, but to the municipal authorities themselves charged with the duty of the prompt collection of the revenues. A party who, like this plaintiff, lies by for four years after making the mistake before he demands a rectification, should at least come with clearest equity and pursuasive proof.

Taylor v. Commissioners, 3 Pen. & Watts (Pa.) 112, is quite like the case under consideration, and is, in my opinion, conclusive against the position of the respondent. The plaintiff paid tax on the wrong land without the fault of the collector. The court, after declaring that the party may, in all such cases, receive and hold money with a good conscience when it is justly due him, where he employs no deceit or unfair means in obtaining it, say: "It is not pretended that the money was unfairly received by the county. It was justly due to the county, and ought to have been Lands are often assessed in the paid by some person. name of those who happen not to be the owners at the time. If they have been the owners at any previous period, the assessments are good." In this State (Missouri) the assessments are good no matter who owns the land. Indeed, it is not usual to inquire of a person who comes forward to pay the taxes on a particular tract of land mentioned by him in what character he wishes to pay, whether as owner or as agent, and under what title. It is a matter of no concern to the county under what character, title or claim he wishes to pay the taxes, for as they are due, the proper officer may, with great propriety, receive them of any one and the first who appears to pay.

The petition, in our opinion, is not sustained by the proofs, and the facts being undisputed, the judgment of the circuit court is reversed. All concur.

The State v. Lawn.

THE STATE V. LAWN, Appellant.

Indictment: LARCENY: CATTLE. An indictment under section 1307, Revised Statutes 1879, for the larceny of neat cattle, is sufficient if it charges the theft of "certain cattle, to-wit, one steer," and the value need not be laid. The term "cattle" designates domestic quadrupeds collectively, but the term "neat cattle" includes only cattle of the bovine species. A steer belongs to the class of neat cattle, and it would be sufficient to use the word "steer" without employing the term "cattle" or "neat cattle."

Appeal from Jefferson Circuit Court.—Hon. J. L. Thomas Judge.

AFFIRMED.

Dinning & Byrns and McMullin for appellant.

D. H. McIntyre, Attorney General, for the State.

The term "cattle" is generic and includes the statutory term "neat cattle." R. S., § 1307. A steer belongs to the class "neat cattle," and courts will take judicial notice of that fact. State v. Hambleton, 22 Mo. 452. It would have been sufficient to use the word "steer," without any other designation. State v. Lange, 22 Tex. 591; State v. Abbott, 20 Vt. 537. Where the statute makes the stealing of specific property grand larceny, the value need not be laid in the indictment. State v. Daniels, 32 Mo. 558.

Martin, C.—The defendant was indicted, tried and convicted for stealing a steer. His punishment was assessed at two years in the penitentiary. Upon taking his appeal, he made application in the Supreme Court for stay of execution, filing in support of it a statement and brief, in which he endeavored to disclose many errors committed against him in the trial. Upon consideration of his statement and brief, his application for a stay of execution was denied. No further brief or statement has been submitted in the prosecution of his appeal. I will notice the material 16–80

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objections urged by him in his original brief, for the purpose of determining whether the record presents any good ground for reversing the judgment.

It is objected that the indictment is insufficient, in failing to allege the value of the steer, so as to bring the charge within the statute defining grand larceny. dictment reads that, "Frank Lawn certain cattle, to-wit, one steer of the property and chattels of James Duff, then and there being found, then and there did feloniously steal, take and carry away." The statute which makes the felonious taking of this species of property grand larceny, without regard to value, uses the term "neat cattle." R. S. § 1307. It is argued that the indictment to be good under this section, ought to have charged the taking and carrying away of "neat cattle." I do not think this objection is well taken. The term cattle designates domestic quadrupeds collectively, and has been held to include horses, sheep and swine, as well as animals of the bovine species. But the term "neat cattle" includes only cattle of the bovine species. A steer belongs to the class of "neat cattle." And as the defendant was indicted for stealing a steer, he was sufficiently informed of the crime charged. He could not assume that he was being prosecuted for stealing any other class of cattle than the class of "neat cattle," to which the steer belongs. I think it would have been sufficient to use the word steer without employing the term "cattle" or "neat cattle." State v. Hambleton, 22 Mo. 452; State v. Lange, 22 Tex. 591; State v. Abbott, 20 Vt. 537; State v. Daniels, 32 Mo. 558.

The court gave an instruction to the effect that recent possession of stolen property is in presumption of law guilty possession, in the absence of any explanation leading to a different inference. It is not claimed that the instruction announced anything erroneous in law, but that there was no evidence of recent possession of the stolen property to justify the court in giving it. I am unable to accept this construction of the evidence. The witnesses for the State

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testified that they went to the premises of defendant very shortly after the steer was missing; that they found between the defendant's dwelling and his straw-stack the hide of the steer, excepting the part on the head; that it was perforated with a bullet hole on each side; that about forty yards further on they found the head of the steer in a gully in the woods, all of which they carried away; that the hide was identified as the hide of the missing steer, and that the head was so identified. The skin was on it, and the owner's son recognized it as his father's steer by two warts on the forehead. On the day of the arrest, the witnesses for the State found fresh beef in the defendant's house in a packing box, consisting of two pieces of hind quarter, some neck and ribs. All together it filled up a two bushel wheat sack. There was also some beef cooked in a pot in defendant's house. The beef was carried away in a sack by witness, James Duff, Jr., who was the owner's son.

No explanation of these facts was attempted by defendant, either by the testimony of witnesses or by himself in the statement made by him at the trial. He admitted that about the time the steer was missing it was with his cattle, but that he did not know it was missing, that it was running with his cattle near his house about two weeks before his arrest. He ventures no explanation about the hide and head found on his premises, and declared that he did not know where the fresh beef came from which was found in his house, and which he admits he had been cooking in a pot. He said that he made no inquiry as to where it came from. When the defendant was arrested he declared that if he had succeeded in getting into the house before the arrest, it would not have been good for the arresting party.

I do not find any errors in the record to the prejudice of defendant, and think the judgment should be affirmed-All concurring, it is so ordered.

SHIRLEY V. BROWN, Appellant.

Title: LIEN: PRIORITY. Where two liens upon real estate are created by the same decree, priority will be given to the one upon which execution is first issued and levied, and a purchaser at a sale thereunder will secure a better title than that acquired by a sheriff's deed at a subsequent sale under the other lien.

Appeal from Carroll Circuit Court.—Hon. E. J. Broaddus, Judge.

REVERSED.

Shewalter & Sebree and Mirick for appellant.

The sale of the land under execution for costs, and the sheriff's deed read in evidence by defendant, is regular on its face and contains all the necessary recitals required by the statute, and it conveyed to defendant the legal title, and is prior in date to that of plaintiff. R. S. 1879, § 2392; Hunter v. Miller, 36 Mo. 147; Chouteau v. Nuckolls, 20 Mo. 442; McIlwrath v. Hollander, 73 Mo. 110, 111.

Hale & Sons for respondent.

Ewing, C.—This is an ejectment suit by Shirley against Brown to recover possession of the west half of the northeast quarter of section 14, township 54, range 22, except

twenty-five acres thereof.

The plaintiff offered in evidence a sheriff's deed reciting as follows: "Whereas, on the 12th day of March, 1879, judgment was rendered in the circuit court of the county of Carroll, in favor of Robert D. Ray and Thomas J. Brown and against James M. Gilson, the amount of said judgment so rendered in favor of the said Robert D. Ray being \$150, and the amount adjudged in favor of the said Thomas J. Brown being the sum of \$15.60, the whole amount of said judgment being for the sum of \$165.60, and costs of suit. Which said judgment was made a special

charge and lien upon the following described real estate in Carroll county, Missouri: The west one-half of the northeast one-fourth of section 14, township 54, range 22, except about twenty-five acres lying west of a slough running through the west part of said west half, upon which judgment a special execution issued from the clerk's office of said court in favor of the said Robert D. Ray and Thomas J. Brown and against the said James M. Gilson, dated the 10th day of February, 1879, directed to the sheriff of the county of Carroll, and the same was to me delivered on the 11th day of February, 1879. By virtue of which said execution, I, the said sheriff, did, on the 15th day of February, 1879, levy upon and seize." Then describes the land of Gilson levied on as above described. The deed then proceeds to recite: "And having previously to the day of sale hereinafter mentioned, given at least twenty days' notice of the time and place of sale, and the real estate to be sold, and where situated, as the law directs, by advertisement in the Carrollton Journal, a newspaper published in my said county; by virtue of which said special execution and notice I did, on the 21st day of March, 1879, at the March term thereof, 1879, expose to sale," etc. That Shirley became the purchaser for \$5.

This was the plaintiff's case, and I have been thus explicit as to the recitals of this deed, as upon the deed the

case principally turns.

The defendant objected to the reading of this sheriff's deed for "uncertainty of description." Defendant answered, putting in issue all the allegations of the petition; admitting possession, which was claimed to be lawful by virtue of the legal title; and pleading the two year statute of limitations. R. S. 1879, § 3219. Defendant then offered in evidence the record of a suit that had been pending in the circuit court of Carroll county, wherein one Burt was plaintiff and against Thomas J. Brown and James Gilson It was a suit in ejectment to recover the land now in controversy, and Gilson was decreed to pay the costs, \$15.60, and

also \$150 to R. D. Ray as an attorney's fee; and the decree by the terms of the compromise was to provide a lien for those sums, due as costs, and as Ray's fee in, their favor on Gilson's part of the land. Defendant then offered the execution that was sued out on the compromise judgment, dated June 24th, 1874. This execution recital shows that it was for the costs alone, and did not purport to include the Ray fee.

Defendant then offered the sheriff's deed made in pursuance of the sale under the foregoing execution, dated August 6th, 1874. It contained the usual recitals, date of judgment, December 19th, 1873; names of parties, Burt against Gilson; amount of judgment, \$15.60, it being for costs, etc.; date of levy, 25th day of June, 1874, on Gilson's land (the land now in controversy); date of sale, 24th day of July, 1874; the name of the purchaser, Thomas J. Brown, and that he bought for \$31.

Defendant then offered in evidence the record of a case in the Carroll circuit court of R. D. Ray against Thomas J. Brown and James Gilson, which was a suit to enforce the lien of Ray against Gilson's land as reserved by the decree in Burt against Gilson and Brown. In this case of Ray against Gilson and Brown, Brown answered, and amongst other things, set up that he was owner and had the title to the Gilson land against which Ray was proceeding, by virtue of his purchase and sheriff's deed in the case of Burt against Gilson and Brown. The record offered, showed judgment for Ray and Brown and a decree enforcing the lien reserved in the other case. This decree was against Gilson alone, (or rather against his land,) and in favor of Ray for his fee, and in favor of Brown for the \$15 costs.

Defendant then offered to prove that at the sheriff's sale, at which he was the purchaser in the case of Burt against Gilson and Brown, R. D. Ray was present and bid at the sale; made no objection and gave no notice of any claim to said land. In the case of Burt against Brown and

Gilson, the decree says: "And it is further ordered and adjudged by the court, that the defendant, James M. Gilson pay all the costs of this suit and a fee of \$100 to Robert D. Ray, and that said costs and said fee of \$100 be and the same are hereby made a charge and lien upon that portion of said land to which said Gilson is entitled.

And it is further ordered by the court that there be hereof execution," etc. Under this decree, equal as a lien for the \$100 fee and the costs, execution is issued for the costs alone, levied on the Gilson land, and Brown, the appellant, became the purchaser, and it is upon the sheriff's deed he received under this purchase, and which he offered in evidence, dated August 6th, 1874, that he claims the With this decree for a lien for the \$100 fee in existence, Ray afterward commenced a proceeding (Ray against Brown and Gilson, and the record whereof was read in evidence), to enforce his lien. Brown answered, setting up his title in defense, and alleging that at the sale when he purchased, "Ray was present and bid, and set up no claim and made no objection to the sale." Ray obtained judgment, which goes on to say, "wherefore it is considered and adjudged by the court, that the said plaintiff, Robert D. Ray, have and recover of the defendant, James M. Gilson, the amount of his said fee and interest, \$150, and that said defendant, Thomas J. Brown, the amount of the costs so paidby him, to-wit, \$15," and that Gilson's land, describing it, "be subjected to sale by special execution to satisfy these sums."

Upon this judgment execution issued and the respondent, Shirley, became the purchaser; and it is under this sale and sheriff's deed he claims title. His judgment bears date, according to his deed, March 12th, 1879, and the deed August 26th, 1879.

Without reference to any supposed defect in deeds, who has the better title? The original liens were equal. Either or both were subject to be enforced by execution. The lien for costs was enforced by execution in 1874, and Brown,

the appellant, was the purchaser. The two liens, one for the Ray fee and the other for costs, were created at the same time and by the same decree; execution was sued out and levy made to enforce the lien for costs, which was fully authorized by the decree, but no steps taken as to the lien for the fee until after the sale under the other; and then a suit commenced to enforce a lien which already existed by a decree of the court, and which was by said decree authorized to be enforced by execution. The issue, levy and sale of the execution under which Brown, the appellant, purchased, gave the lien for costs priority over the other lien, under which no steps were taken until after the levy and sale above mentioned. Just as in two judgments rendered at the same term of court being by statute made equal liens on the defendant's real estate, (1 R. S., § 2731,) the one can obtain priority by issuing execution; so in this case we hold that the issue and levy of the execution for costs gave a priority in its favor over the other lien in the same decree, and the purchase thereunder by the appellant gave him a better title than that acquired by the sheriff's deed and under the subsequent sale. Bruce v. Vogel, 38 Mo. 100; Burney v. Boyett, 1 How. (Miss.) 39; Adams v. Dyer, 8 Johns. 347; Rockhill v. Hanna, 15 How. (U.S.) 189; Smith v. Lind, 29 Ill. 24.

The judgment is, therefore, reversed and the cause remanded without passing upon other questions reviewed in the record. All concurring.

RAY, J., not sitting.

The State v. Irwin.

THE STATE V. IRWIN, Appellant.

Criminal Practice: LARCENY: INSTRUCTIONS. On a trial for larceny where there is evidence to prove a mere trespass, and the defendant's guilt is very much in doubt, the Supreme Court will closely scrutinize the instructions and reverse the cause if they are misleading.

Appeal from Mercer Circuit Court.—Hox. G. D. Burgess, Judge.

REVERSED.

Wright & Robinson and H. J. Alley for appellant.

The verdict was against the weight of evidence, as the proof shows that the offense was only a trespass. Mrs. S. A. Duncan, for the State, testified that she was the owner of the mare, and that defendant came to the house, shot-off his revolver, made some threats, then went to the lot, got the mare and tied her up. Mrs. S. A. Duncan and family knew he had the mare, but said nothing to him about taking her. The proof on part of State shows that defendant took the mare openly, gave his true name when he traded her off, also that the mare was claimed by Serena Duncan, daughter of S. A. Duncan, who was of full age and of whom defendant got the mare. The court erred in overruling defendant's motion for new trial on ground of newly discovered evidence, the affidavit in support of same showing that the mare was the property of Serena Duncan, that by the appraisers the mare was actually set apart to her, and that she received said mare in the presence and at the request of S. A. Duncan.

D. H. McIntyre, Attorney General, for the State.

The jury had the question of ownership and of the intent with which the mare was taken, properly presented to them by correct instructions, and found against defend-

The State v. Irwin.

ant, and the verdict should not be disturbed. State v. Musick, 71 Mo. 401; State v. Warner, 74 Mo. 83. If appellant took the mare for the benefit of Serena Duncan, knowing she was not the property of Serena, he is guilty. People v. Juarez, 28 Cal. 380; Hamilton v. State, 35 Miss. 214. The criminal intent consists in the purpose to deprive the owner of his property. Williams v. State, 52 Ala. 411; Reg. v. White, 9 Car. & P. 344; Roscoe's Crim. Ev., (7 Am. Ed.) 644. The newly discovered evidence did not warrant a new trial. State v. Ray, 53 Mo. 345; State v. Smith, 65 Mo. 313; State v. Butler, 67 Mo. 59.

Hough, C. J.—The defendant was convicted of stealing a mare alleged to be the property of one Mrs. S. A. Duncan. The only question presented in the brief of defendant's counsel is, whether the evidence is sufficient to support a conviction. It is contended that the testimony shows that the taking of the mare in question was, at most, only a trespass. The defendant testified at the trial, and admitted the taking and trading of the mare. There was some testimony tending to show that the taking was larcenous, and there was testimony tending to show that the defendant took and traded the mare with the permission of Serena Duncan, the reputed owner of the mare, and a daughter of Mrs. S. A. Duncan. Each of the judges has attentively considered the testimony, and all are of opinion that it leaves the question of the defendant's guilt so much in doubt, as to invite the closest scrutiny of the instructions, which were excepted to and brought to the attention of the court in the motion for a new trial. Record evidence of a former conviction of a like offense, was adduced at the trial, for the purpose of increasing the punishment, under section 1664 of the Revised Statutes.

The following instructions, among others, were given on behalf of the State:

1. The jury are instructed that if the defendant took and stole the mare of S. A. Duncan, at this county, in Sep-

tember last, and that he is the same Lyman Irwin named in the transcript of the record of the circuit court of Gentry county, Missouri, which has been read in evidence, then he is guilty, and if the jury so find from the evidence beyond a reasonable doubt, they will find him guilty.

4. If the jury find the defendant guilty, they will assess his punishment in the penitentiary for a term of

seven years.

We regard the instructions as sufficiently misleading to justify a reversal of the judgment, in view of the evidence in the case. That clause of the first instruction which refers to the record of former conviction, should have been embodied in the fourth instruction, and omitted from the first.

All are of opinion that the judgment should be reversed and the cause remanded.

Gregg, Appellant, v. The Farmers & Merchants' Bank of Hannibal, Garnishee of the St. Louis, Hannibal & Keokuk Railroad Company.

Garnishment: BANK, DEPOSIT. Money deposited in bank to the credit of the depositor as "Supt." is liable to garnishment as a debt due the execution defendant, it appearing that the depositor was the latter's superintendent and that the money belonged to it.

Appeal from Hannibal Court of Common Pleas.—Hon. Theo. Brace, Judge.

REVERSED.

H. B. Leach and T. H. Bacon for appellant.

The pleadings forming the issue in garnishment are a part of the record. *Union v. Dillon*, 75 Mo. 380; Drake on Attachment, (1 Ed.) § 658 a. The instruction asked by

appellant properly declared the law to be that the defendant could have the depositor impleaded as a party. R. S. 1879, § 254; Wimer v. Pritchett, 16 Mo. 252; Cohen v. St. Louis, etc., 11 Mo. 374. The deposit account in the name of "W. W. Walker, Supt.," was of itself notice that the depositor was an agent depositing his principal's money, (Bridgman v. Gill, 24 Beav. 306,) and the deposit was prima facie that of an agent, (Bank v. Jones, 42 Pa. St. 536,) and the defendant in execution had the legal right to enforce in its own name the payment of the money, (Washington v. St. Marys, 52 Mo. 480,) and as legal priority in contract as well as in interest was thus shown, the garnishee was liable. Drake on Attachment, chap. 21, § 490; Morse on Banking, (2 Ed.) 300; Bills v. National, etc., 89 N. Y. 343; Raynes v. Lowell, etc., 4 Cush. 343. The garnishee's answer admitted its knowledge that W. W. Walker "held some official relation to defendant." The debit could not have been garnisheed by a creditor of the depositor, (Farmers, etc., v. King, 57 Pa. St. 202,) and the depositor could not have been garnisheed as the debtor of defendant in execution. Mueth v. Schardin, 4 Mo. App. 403; Neuer v. O'Fallon, 18 Mo. 277.

Easley & Russell, W. P. Harrison and D. H. Eby for respondent.

The garnishee cannot be charged because there was no privity of contract between the defendant and the garnishee; the defendant in execution could not have maintained either debt or indebitatus assumpsit against the garnishee at the time the garnishment process was served. Plaintiff's denial did not raise or state a cause of action in plaintiff, and the finding of the trial court was right on both the pleadings and evidence. R. S., § 2533; Union Bank v. Dillon, 75 Mo. 380. The trial court did not err in refusing to give the declaration of law asked by plaintiff. Dobbins v. Hyde, 37 Mo. 114; Wilson v. Murphy, 45 Mo. 409; Karnes

v. Pritchard, 36 Mo. 135; 39 Mo. 157; Sheedy v. Nat. Bank. 62 Mo. 17.

Henry, J.—On the 15th day of November, 1880, the sheriff of Marion county, by virtue of an execution in favor of plaintiff against the defendant railroad company, issued from the Hannibal court of common pleas, served a garnishment on the defendant bank. To interrogatories filed, the bank made the following answer:

"The Farmers & Merchants' Bank of Hannibal, Missouri, garnishee in the above entitled cause, now comes by its president, and in answer to the interrogatories filed herein by the plaintiff, says that at the time it was summoned herein, it was not, nor since has it become indebted in any way to the defendant, that it has not, to its knowledge, nor now has in its possession or under its control any property of any kind belonging to the defendant, unless it be as hereinafter stated. In further answer the said bank further says that W. W. Walker, of Hannibal, Missouri, who, as the bank understands, held some official relation to the defendant, the exact character of which is unknown to said bank, had deposited in said bank at sundry times prior to the time of said summons, sundry amounts of money under the name of W. W. Walker, Supt., and had on deposit at said time of summons under said name and title, the sum of 500, or more, dollars, the said bank not being advised what interest, if any, the defendant had in said money so on deposit in said bank to the credit of said W. W. Walker, Supt., as aforesaid. The said bank having fully answered, asks that it be discharged with its costs."

To which plaintiff replied as follows: "Replying herein, the plaintiff denies each and every allegation in the garnishee's answer, except the allegations in regard to W. W. Walker and his dealings with said garnishee. And for new matter herein, the plaintiff says that said W. W. Walker was and is the agent of said St. Louis, Hannibal & Keokuk Railroad Company, to-wit: the superintendent

thereof, and said money so on deposit in said bank to the credit of W. W. Walker, Superintendent, was and is the money of said St. Louis, Hannibal & Keokuk Railroad Company, and was as such deposited by said W. W. Walker, as said superintendent of said company defendant, its chief officer in this State, carrying on its business as a railroad company, corporation and common carrier. Wherefore plaintiff prays judgment of garnishment herein for the amount of judgment and costs due plaintiff on its judgment against said company, and all proper relief."

To the plaintiff's denials and averments, the garnishee

duly replied by a general denial.

The evidence introduced by the plaintiff to sustain the garnishment proceedings, is fully set out in appellant's abstract, from which it appears that W. W. Walker, on behalf of plaintiff, testified that he was the person named as W. W. Walker, Supt., as a depositor in defendant's bank; that at and prior to the time of making said deposits he was the superintendent of the St. Louis, Hannibal & Keokuk Railroad Company; that he made said deposit in the name of "W. W. Walker, Supt.," and that the money so deposited was the money of the said railroad company. He further said that he was the chief officer of the road in this State, and that he made the deposit in the name of "W. W. Walker, Supt.," to keep it separate from his own money, and checked it out as needed to pay the running expenses of the road, including the payment of his own salary as superintendent; that the said deposit was not his own money, and he had no claim to it as his own, "though the said railroad company was in debt to him."

A. R. Levering, on behalf of plaintiff, testified that he was the cashier of said Farmers & Merchants' Bank, garnishee, pending said deposit in the name of W. W. Walker, Supt." That he did not know what the word "Supt." after Walker's name stood for or represented; and did not know the name of the railroad company by which Mr. Walker was employed. "The bank did not know the rail-

road company in the transaction; and did not know that the said railroad company had any interest in the money."

Upon the evidence the plaintiff asked the court to declare the law as follows:

The court instructs the jury that for the purposes of this action of garnishment the plaintiff is to be taken as the assignee of all the legal rights, if any, of the St. Louis, Hannibal & Keokuk Railroad Company to the indebtedness, if any, of the Farmers & Merchants' Bank of Hannibal, Missouri, represented by its deposit entry in the name of "W. W. Walker, Supt.," and if the jury believe from the evidence that prior and up to the time of said garnishment the said W. W. Walker was the superintendent of the said St. Louis, Hannibal & Keokuk Railroad Company, and as such deposited in said bank to the credit of "W. W. Walker, Supt.," the funds of the said St. Louis, Hannibal & Keokuk Railroad Company for the purpose on his own part of keeping said fund as the money of said railroad company separate and distinct from said Walker's individual funds, and that on the witness stand in this cause said W. W. Walker has disavowed any claim to said fund except as the superintendent of said railroad company and in that capacity, it is the privilege of said Farmers & Merchants' Bank of Hannibal, Missouri, to apply for and secure an order on said W. W. Walker to appear in this cause and show cause, if any he has, why said money so due on said deposit account of W. W. Walker, Supt., should not be applied to the satisfaction of this garnishment, and in the absence of any such application on the part or behalf of said bank, the jury will find for the plaintiff.

The court refused to give the declarations asked, found for the garnishee, and rendered final judgment in its favor; from which ruling and judgment plaintiff appealed.

We are of the opinion that the court should have given the instruction asked by plaintiff. The evidence established the fact, that notwithstanding the money was deposited by Walker, it was really the property of the railroad company,

of which he was superintendent. The cases cited by respondent's counsel to the effect that garnishment is "a legal proceeding, and not adapted for the ascertainment and settlement of equitable rights between the garnishee and defendant," are not questioned. Neither is the doctrine announced in Firebaugh v. Stone, 36 Mo. 114; Scales v. Southern Hotel Co., 37 Mo. 520, and McPherson v. A. & P. R. R. Co., 66 Mo. 103, doubted. This court, in those cases, simply held that the garnishee is liable to the creditor to the same extent that he was liable to the defendant in the execution. "Even at law an unknown principal may often avail himself of a contract made with his agent. In the case of a simple contract he may show that the apparent party was his agent, and treat the contract as made with himself, not, however, injuriously affecting the rights of the other party. In many of these cases he is allowed to sue directly upon the contract. But whenever he can show that his money has been placed in the hands of another by his agent, it is no objection to his claim that the other has promised to pay it to the agent." Farmers & Mechanics' Bank v. King, 57 Pa. St. 204.

The manner in which the deposit was made, in this case, was notice to the bank, that the money was not the property of the depositor, but of another. The depositor himself testified that it belonged to the railroad company. There were no equities to settle between the bank and the depositor, or between the railroad company and the bank or depositor. It was a simple question, in which the triers of the fact would not be embarrassed by any equities claimed by any one against the company's right to the money. The above and other Pennsylvania cases, cited by appellant's counsel, fully sustain the view of the law presented by his refused instruction, and in Drake's work on Attachment, the doctrine is approved. § 491, and notes. Morse on Banks and Banking, (2 Ed.) 302.

Nor is this in conflict with what was held in the State ex rel. v. Powell, 67 Mo. 395. There, Powell, a school trustee

and treasurer of the school funds of a school township, deposited as treasurer, the school moneys in a bank which afterward became insolvent, and the money was lost. Powell was held personally liable for the money, on the express ground, "that as a public officer, he was subject to special obligations for the benefit of the public, and that his degree of responsibility was not to be determined by the ordinary law of bailment."

The judgment is reversed and the cause remanded. All concurring.

MITCHELL et al., Appellants, v Nodaway County et al.

- Deed of Trust: SALE: VALIDITY. A sale of real estate under a
 deed of trust executed before the late civil war is valid, although
 the grantors in the deed made to secure payment of promissory
 notes were citizens and residents of a state declared to be in insurrection at the time of the sale made while the war was in progress.
- 2. Sheriff's Deed: Advertisement: Clerical Mistake: Evidence. A clerical mistake in an advertisement of sale of real estate by the sheriff, is insufficient to contradict the recitals in the sheriff's deed, which are by statute made evidence of the facts stated. R. S. 1855, § 56, p. 748; R. S. 1879, § 2392. Irregularities in the advertisement will not invalidate the title of bona fide purchasers who had no notice of such irregularities and no part in their commission.
- 3. Swamp Lands: TITLE: RIGHT OF COUNTY TO PURCHASE AT MORT-GAGE SALE. Under the act of February 23rd. 1855, (R. S. 1855, chap. 93,) and previous acts, the absolute title to the swamp lands in the different counties vested in them respectively, and when purchased of the county with mortgage to secure the purchase money, the county has the right to buy them in, the same as a purchase by a private mortgagee.

Appeal from Nodaway Circuit Court.—Hon. H. S. Kelley, Judge.

AFFIRMED.

William Heren for appellants.

Nodaway county had not the right to sell the lands of appellants and make title thereto during the progress of the civil war, when appellants were residents within the confederate lines before and all the time during the war. De Jarnette v. De Giverville, 56 Mo. 451, dissenting opinion of Judge Napton; McMerty v. Morrison, 62 Mo. 140; Douthitt v. Stinson, 63 Mo. 268; Martin v. Paxson, 66 Mo. 260. The sale was without notice and was void. Herman on Ex., p. 345; Olcott v. Robinson, 21 N. Y. 150; 20 Barb. 148. He who buys under a power, buys at his peril, and acquires no title unless he can show a valid, subsisting power. Herman on Ex., 419, § 255; 18 John, 441; 36 Mo. 521; 37 Mo. 365. The proceedings being in derogation of common right, nothing can be presumed in their favor, but every requirement of the law must be complied with. 882; 4 Pet. 349; 19 John. 7; 4 Hill 76, 92. county had no right to buy the land. Ray Co. v. Bently, 49 Mo. 236; Holt Co. v. Harmon, 59 Mo. 165. Appellants brought this suit within ten years, the time required by the statute of limitations. Kelly v. Hurt, 61 Mo. 463; Rogers v. Brown, 61 Mo. 187.

Johnston & Jackson and Dawson & Anthony for respondents.

The mortgaged lands were within the jurisdiction of the court, and the right to make the order of sale was not suspended during the late war because the mortgageors were residents of Tennessee. University v. Finch, 18 Wall. 106; De Jarnette v. De Giverville, 56 Mo. 440; Black v. Gregg, 58 Mo. 566. The county court had jurisdiction and no notice was necessary. Hurt v. Kelly, 43 Mo. 238; Seymour v. Bailey, 66 Ill 288, 297. The mortgage might have been foreclosed any time after January 1st, 1860. This suit was not commenced until eight years and eight months

after the sale, and the claim was too stale. Moreman v. Talbott, 55 Mo. 392; Stevenson v. Saline Co., 65 Mo. 425: Carpenter v. Carpenter, 70 Ill. 457; McQuiddy v. Ware, 20 Wall. 14. The land being "swamp or overflowed lands," the county had a right to purchase them. Linville v. Bohanan, 60 Mo. 554; Stevenson v. Saline Co., 65 Mo. 425. The sale certainly becomes absolute in the hands of a second party-a bona fide purchaser. Thornton v. Irwin, 43 Mo. 153; Landrum v. Bank, 63 Mo. 48; Vogler v. Montgomery, 54 Mo. 577. The failure of the sheriff to advertise does not vitiate the sale. Curd v. Lackland, 49 Mo. 451; Bryson v. Draper, 17 Mo. 83. The sheriff could make a new deed properly describing the lands, if in accordance with the facts. Ware v. Johnson, 55 Mo. 500; Porter v. Mariner, 50 Mo. 364.

RAY, J.—This is a proceeding in the nature of a bill in equity, to set aside a sale of certain "swamp and overflowed lands" in Nodaway county, Missouri, made by the sheriff of that county under a common statutory school mortgage with power of sale on default, and the order of the county court thereon, as provided by sections 22 and 30 of article 2, chapter 143, Revision of 1855, pages 1424, 1425; and also to cancel the sheriff's deed for said lands made to said county at said sale; and also to cancel certain other deeds for said lands thereafter made by said county to various other parties, and allow the plaintiffs to redeem said lands by the payment of the mortgage debt and interest, for which purpose the plaintiffs bring into court and tender the money so due and owing. The grounds of relief charged in the petition and insisted on here, are: 1st, That the sale of said lands, the order of the court and all other proceedings touching the foreclosure of said mortgage were unlawful, null and void, for the reason that they all occurred during the late civil war between the United States, including the State of Missouri and said Nodaway county, on the one side, and the so-called confederate states, including

the state of Tennessee and the county of Jefferson, on the other, and while the plaintiffs were citizens and residents in the latter state and county and within the confederate lines, That by the laws of war, the act of congress and the proclamation of the President touching the same, all commercial intercourse and business transactions of whatever kind between individual citizens of said belligerents were suspended, forbidden and made unlawful; and that all remedies and proceedings, judicial or otherwise, for the collection of debts between the inhabitants of Jefferson county, Tennessee, and Nodaway county, Missouri, and between said Nodaway county and these plaintiffs, were by the rules of war and laws of nations also suspended and rendered unlawful, null and void. 2nd, That the advertisement for the sale of said lands under said mortgage was for the 3rd day of March, 1864, while the sale took place on the 3rd day of May, 1864, without any other or further notice thereof. 3rd, That Nodaway county had no right or power to become a purchaser of said lands at said sale.

The answers of defendants substantially took issue on all these allegations of the petition, claiming that said sales, proceedings and conveyances were all legal and valid; that the advertisement as well as the sale was for the 3rd day of May, and that said Nodaway county had the right and power to become the purchaser of said lands at said sher-The answers further charge that the purchase of said lands by Nodaway county was for a valuable consideration and fairly made, and that all its subsequent sales of said lands to the various purchasers and holders thereof. were for a valuable consideration, in good faith, and without any notice on the part of said purchasers of any irregularity in the sale and foreclosure of said mortgage, if any there was; that most of said purchasers had taken possession and made valuable and lasting improvements thereon, long before the plaintiffs commenced this suit, and that plaintiffs, if they ever had any rights or equities in the premises, have slept thereon, and by their laches are now

estopped from setting up the same as against said subsequent purchasers and holders of said lands.

The material facts as shown by the record, are sub-That the lands in question are situated in Nodaway county, Missouri, and were what is known as "swamp and overflowed lands" belonging to said county under certain grants from the general government and the State of Missouri, for the purpose therein declared. That plaintiffs bought them from said county and gave the county their note or bond for the purchase money, due and payable the 1st day of January, 1860, and received from said county a deed therefor, and at the same time executed to said county the statutory mortgage in question, with power of sale therein on default, to secure the payment thereof. record further shows that default was made in the payment of said purchase money at the maturity thereof, and that thereafter the order in question for the sale of said lands under the power in said mortgage, together with the sale itself, as well as the sheriff's deed therefor to said county, . were all made during the existence of said civil war and while the plaintiffs were citizens and residents within the confederate lines. That after the close of the war the plaintiffs came to Nodaway county, Missouri, first in 1865 and again 1868 or 1869, and learned and were advised of all the acts and doings of which they now complain, but took no steps to assert their alleged rights and equities until the institution of this suit in January, 1873. It further appears that the sheriff's deed to Nodaway county for said lands recites, among other things, in substance, that an order was made for the foreclosure of said mortgage and a writ in the nature of a fieri facias was duly issued thereon and delivered to said sheriff on the 4th day of April, 1864, by virtue of which said sheriff on the 7th day of April, 1864, levied on said lands, and having previous to the day of sale thereafter mentioned, given at least twenty days notice of the time and place of sale by advertisement, by virtue of which said execution and notice said sheriff, on

the 3rd day of May, 1864, agreeable to said notice, did sell said lands for cash in hand, when and where Nodaway county became and was the purchaser thereof at and for \$1,000, etc.

To impeach this deed and contradict the same, as to the time at which said lands were advertised for sale, the plaintiffs after having themselves introduced said sheriff's deed as evidence, also offered and read in evidence what purported to be a copy of said advertisement, the original being lost, which in substance is to the following effect:

"Sheriff Sale.—That by virtue of an order of the Nodaway county court in the nature of a fieri facias on the foreclosure of said mortgage to me directed, I will, on Tuesday, the 3rd day of March, 1864, at, etc., proceed to sell the lands in question, (describing them,) etc. Given under my hand this 7th day of April, 1864.

(Signed) WILL SWINFERD, Sheriff." etc.

On which is the following indorsement: "The within described real estate levied upon by virtue of the writ of execution, was all sold to Nodaway county at and for the sum of \$25 per forty acres, she being the highest and best bidder therefor, except the southwest one-fourth of the southwest quarter section 33, township 62, range 34, which was sold to S.W. Jackson at and for the sum of \$80. This 3rd day of May, 1864.

(Signed)

S. SWINFERD, Sheriff."

In rebuttal there was some oral testimony tending to show that the advertisement of said sale was for the 3rd day of May, and not March, as appears in said copy, and that the word March therein was a mistake and clerical error in making said copy. Upon this state of the pleadings and the evidence, the finding and judgment of the circuit court were for the defendants, from which the plaintiffs have appealed to this court and here assign the same for error.

The first point or ground of relief set up in the peti-

tion and here mainly relied on for a reversal of this cause, it will be found by an examination of the authorities touching the same, has been expressly ruled against the position claimed by the plaintiffs. In the case of University v. Finch. 18 Wall. 106, the Supreme Court of the United States held as follows: 1st, "A sale of real estate made under a power contained in a deed of trust executed before the late civil war, is valid notwithstanding the grantors in the deed which was made to secure the payment of promissory notes, were citizens and residents of one of the states declared to be in insurrection at the time of the sale made while the war was 3rd, "The property of each citiflagrant. zen found in a loyal state is liable to seizure and sale for debts contracted before the outbreak of the war, as in the case of other non-residents." To the same effect, also, are the following authorities: De Jarnette v. De Giverville, 56 Mo. 440; Black v. Gregg, 58 Mo. 565; Mixer v. Sibley, 53 Ill. 61; Harper v. Ely, 56 Ill. 179; Willard v. Boggs, 56 Ill. 163: Seymour v. Bailey, 66 Ill. 288, 297; Dorsey v. Dorsey, 30 Md. 522. The principle of these cases is clearly applicable to the case at bar, and they must be accepted as conclusive of this case on that point.

The second point or ground of relief set up in the petition and here relied on, is not supported by the facts in the record. It is true that the copy of the advertisement read in evidence makes it so appear; but from the whole record we think it quite manifest that the word "March" therein is the result of a clerical error or mistake in copying. This, indeed, is apparent upon the face of the paper itself. While the 3rd of March purports to be the date of the sale, the advertisement itself bears date the 7th of April, nearly a month after the day fixed for the sale. To advertise on the 7th of April that you will sell on the 3rd of March preceding, is simply absurd. The date so fixed was a month before the sheriff received the writ. Such evidence is clearly insufficient to contradict the recital in the sheriff's deed that the sale in question was advertised for

the 3rd of May. This recital, by statute, is made evidence of the fact so stated. § 56, p. 748, R. S. 1855, and § 2392, R. S. 1879; Turner v. Stine, 18 Mo. 583. Even if the said advertisement was irregular as charged, still under the authorities and facts of this case the defect is not such as to invalidate the title of the parties holding under purchases from Nodaway county. Before the institution of this suit the lands in question had all been re-sold by the county to the present holders, all of whom purchased for value, in good faith, and without any notice or participation in the irregularities charged. In such cases the authorities are uniform that such irregularities or want of advertisement will not invalidate the title of such bona fide purchasers. Curd v. Lackland, 49 Mo. 451, 454, 455; Draper v. Bryson, 17 Mo. 71, 73, 75; Stewart v. Severance, 43 Mo. 322; Houck v. Cross, 67 Mo. 151; Davis v. Kline, 76 Mo. 310; Stevenson v. Saline Co., 65 Mo. 425.

The third and last point relied upon by plaintiffs has also been expressly ruled against the plaintiffs. In the case of Linville v. Bohanan, 60 Mo. 554, it was held that "under the act of February 28th, 1855, and the various previous acts relating thereto, the absolute title to the swamp lands in the different counties was vested in them respectively, and where purchased of the county with mortgage to secure the purchase money, the county has the right to buy them in equally as in the case of a purchase by a private mortgagee. Such a purchase is not to be confounded with the purchase of lands, such as state school lands, to which the counties never had any title." There are some minor questions and facts not material to the proper disposition of this case which it is unnecessary to notice.

As we find no error in the record, the judgment of the circuit court is affirmed. All concur.

Fulton Iron Works v. North Center Creek Mining & Smelting Co.

FULTON IRON WORKS V. NORTH CENTER CREEK MINING & SMELTING COMPANY, Appellant.

Mechanic's Lien. A mechanic's lien is enforceable for all the items of an account furnished by the original contractor, for supplying the articles needed in the construction of the building and machinery in which they were used, where it is inferable from the evidence they were furnished under one contract.

Appeal from Jasper Circuit Court.—Hon. M. G. McGregor, Judge.

AFFIRMED.

Phelps & Brown for appellant.

The finding and judgment of the court are unsupported by the law or the evidence. Baylan v. Victory, 40 Mo. 244; Madison, etc., Co. v. Colona, 36 Mo. 446. The materials not having been furnished under one contract, the lien was lost as to that furnished more than six months before commencement of lien proceedings. Phillips on Mechanics' Lien, & 324; Watts v. Whittington, 48 Md. 353; Trustees, etc., v. Hill, 44 Md. 454; Sweet v. James, 2 R. I. 270; Lawrence v. Wright, 33 Mo. 31; Phillips v. Duncan, 1 Pitts. (Pa.) 125; Spencer v. Burnett, 35 N. Y. 44. The right to enforce a mechanic's lien is founded solely upon the statute, and unless the party claiming to be entitled to its benefits brings himself clearly within its provisions, he cannot enforce the lien. Overton on Liens, § 532; Hubbard v. Schreyer, 14 Abb. Prac. R. (N. S.) 284; Hayward, etc., v. Loomis, 2 Dis. (Cin.) 544; Slag v. Thousand, etc., 16 N. Y. Sup. Ct., 428; 35 N. Y. 94.

Harding & Buler for respondent.

Mechanics' liens are remedial, and are to be construed liberally to advance the just and beneficial objects in view in their enactment. *De Witt v. Smith*, 63 Mo. 263; Smith's Com., § 547. When a lien is filed it relates back to com-

Fulton Iron Works v. North Center Creek Mining & Smelting Co.

mencement of the building. Douglass v. Zinc Co., 56 Mo. 388. When items come within a fair construction of the contract, or the understanding of the parties or an implied agreement to furnish machinery, the lien will be good. Gerard B. Allen Co. v. Frumet Iron & S. Co., 73 Mo. 688. A running account is good from the date of the last item. Stine v. Austin, 9 Mo. 554; Ring v. Jamison, 66 Mo. 424. The evidence shows all the materials were furnished under one contract, and the lien is, therefore, good.

Norton, J.—This suit was brought to enforce a mechanic's lien for materials, fixtures, engines and machinery furnished and sold to the defendant for buildings, structures, engines and machinery for certain buildings and machinery known as reduction and dressing works for reducing, cleaning and dressing zinc and lead ores, situated on certain land in the petition described.

The date of the first item of the account was March 29th, 1878, for crusher jaws, mineral rolls, etc. The account then ran through April, May and up to September 16th, 1878. The next item in the account was April 23rd, 1879, with various items, running through April and May,

1879, the account closing May 23rd, 1879.

The account was filed with the circuit clerk of Jasper county on the 29th day of July, 1879, and suit was begun on the 15th day of October thereafter. The cause was tried before the court without a jury. It appeared in evidence that respondents furnished the articles mentioned in said account at the dates respectively stated in the account, but the appellants insisted on the trial that plaintiff had no lien on the property in controversy for any of the items in its account which accrued on or before the 23rd day of April, 1879, unless at or before such items were furnished, it was agreed and understood between the parties that the plaintiff should subsequently furnish such supplies and materials to the North Center Creek Mining & Smelting Company, and that the account was to be kept open for the

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purpose of adding such subsequent purchases. The court below gave judgment for plaintiff and enforced a lien for the full amount of said account on the buildings and machinery described in plaintiff's petition. From this judgment defendants have appealed.

The cause was tried by the court without the intervention of a jury. The only evidence in the case was offered by plaintiff, at the close of which, at defendant's instance,

the court gave the following instruction:

The court declares the law to be, that if there were no dealings or transactions between the plaintiff and the North Center Creek Mining & Smelting Company, or any one on its behalf, from the 16th day of September, 1878, until the 23rd day of April, 1879, and there was no contract or understanding that there would be any such dealings or transactions, then the plaintiffs have no lien for any of the items

in their account prior to April 23rd, 1879.

It is insisted by counsel for defendant that there was no evidence to sustain the judgment, and that, for that reason, it should be reversed. The question, therefore, presented for our determination is not whether the judgment was against the weight of evidence, but whether there was any evidence at all upon which it could rest. The evidence presented in the bill of exceptions clearly establishes the fact that all the items of the account were furnished defendant, and that all of them went into its reduction and dressing works at Webb City, and that the prices charged were correct: it further shows that the account began in March, 1878, and ran through April, May and September of that year, the last charge during the year being made on the 16th day of September. No further charge appears on the account till the 23rd of April, 1879, when the account shows that through that month and up to May 22nd various articles of a like character with those furnished previous to that time. If this were all the evidence, then, from the lapse of time intervening between the charge made in September, 1878, and the charge made in April, 1879, under

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the authorities cited by counsel for defendant, we would be justified in drawing the inference that the articles furnished in 1878 and 1879 were furnished under separate and distinct contracts, and that plaintiff's lien could only be enforced for the articles furnished in 1879. But there was other evidence which we think tended to overthrow this inference, and establish the fact that all the items of the account were furnished under one contract. Gerard B. Allen, who was introduced as a witness, testified as follows:

"I reside in the city of St. Louis. I was the president of the corporation known as the Gerard B. Allen & Co. from the 1st of March, 1878, to October 8th, 1879, when the name of the company was changed to Fulton Iron Works." Witness being shown account marked exhibit "A," says: "I have examined said account and believe it to be correct. The items therein charged are of the value therein stated, and were furnished by plaintiff as an original contractor to the North Center Creek Mining & Smelting Company, to be used in their reduction and dressing works at Webb City, Missouri. Plaintiff has allowed all just credits in said account, and after allowing same, defendant owes plaintiff the sum of \$1,549.51, with interest from the date of the last item, June 22nd, 1879, as under our rule with customers of character of defendant such bills are payable on demand, but as a rule, we are in the habit of demanding payment thirty days after the last item of the account."

Mr. Fisher also testified as follows: "I reside in St. Louis, State of Missouri; in the month of March, 1878, and continuously up to the 22nd day of May, 1879, I was superintendent of the Fulton Iron Works, formerly the Gerard B. Allen & Co., St. Louis, Missouri. It was a corporation under the name of Gerard B. Allen & Co. then, and engaged in the business of machinists and iron manufacturing in St. Louis, Missouri. It continued to do business up to 22nd of May, 1879, at same place, under same corporate name. I know the North Center Creek Mining &

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Smelting Company. It does business at Webb City, Jasper county, Missouri. Its business was lead and zine mining, and reducing lead and zine ores. Gerard B. Allen & Co. had business transactions with that corporation during the time mentioned, from March, 1878, to May 22nd, 1879. It furnished machinery to said North Center Creek Mining &

Smelting Company."

In the face of the statement made by Mr. Allen that the items charged were furnished by plaintiff "as an original contractor," and the statement of Fisher that plaintiff had business transactions with defendant from March, 1878. to May 22nd, 1879, it cannot be said that there was no evidence tending to show that all the items of the account were furnished under one contract. While it is not stated in express terms that there was but one contract under which the articles were furnished, we think it fairly, if not necessarily inferable from the statement, that they were furnished by plaintiff as an original contractor, that there was but one contract for supplying defendant with such articles as might be needed in the construction and completion of their works. The statement excludes the idea of their having any other contract than the one whereby plaintiff became an original contractor. The action of the trial court is sustained by the following cases; G. B. Allen & Co. v. Frumet M. & S. Co., 73 Mo. 688; Coal Co. v. Steamboat Colona, 36 Mo. 446; Boylan v. Steamboat Victory, 40 Mo. 244. In both of the cases last cited periods of six months had elapsed between items of the account, and in the latter case it was observed: "Where it is specially agreed or impliedly understood between the parties that the account is to be kept open and continued as one and the same continuous transaction and course of dealing, the account will be considered as one continuous account and one demand," and there was evidence before the court from which it might reasonably be inferred that such had been the understanding of the parties.

Judgment affirmed. All concur.

Harrington v. Minor.

HARRINGTON, Appellant, v. MINOR.

Practice: OBJECTIONS: INSTRUCTIONS. This court will not review a case when no objections are made or exceptions saved to the admission of evidence during the trial, and no instructions asked, or given by the court. The law applicable to a case can only be reviewed by this court when declarations of law or instructions are asked.

Appeal from Jasper Circuit Court.—Hon. M. G. McGregor, Judge.

AFFIRMED.

Harding & Buler for appellant.

A. L. Thomas with Phelps & Brown for respondent.

No instruction having been asked or given, there is nothing for this court to review. Easley v. Elliott, 43 Mo. 289; Wilson v. Ryles, 46 Mo. 36; Weilandy v. Lemuel, 47 Mo. 322. Attorney's fees are properly allowable by way of damages upon the dissolution of an injunction. Hann. & St. J. R. R. Co. v. Shipley, 1 Mo. App. 254; State Treasurer v. Bledsmire, 56 Mo. 226; Uhrig v. City of St. Louis, 47 Mo. 528.

EWING, C.—This is an appeal from the action of the circuit court of Jasper county in assessing damages upon an injunction bond. A jury being waived, the cause was tried by the court.

No objection was made, on the trial by appellant, to the introduction of the testimony or the mode of assessing the damages, nor were there any instructions of law asked or given by the court. There is nothing in this case for this court to review.

The only way in which errors can be corrected, if the law is wrongfully decided, or a misapplication of the law to the facts is made by the lower court, is to ask declaraThe State ex rel. Davis v. Goodnow.

tions of law or instructions, in order that this court may see upon what theory the court below proceeded. There is no question of law presented or saved in a manner which this court can review. Easley v. Elliot, 43 Mo. 289; Weilandy v. Lemuel, 47 Mo. 322.

Judgment affirmed. All concur.

The State ex rel. Davis, Collector, v. Goodnow; Ayler, Interpleader, Appellant.

- Fixtures: SEVERANCE. The owner of land has the right to sever fixtures from the freehold, and they may be severed and lose their character as fixtures by accident.
- TAXES: LIEN. The lien of the State for taxes on the realty, cannot follow severed fixtures as personal property.
- 3. Taxes: COLLECTION: SEIZURE. No means can be resorted to to coerce the payment of taxes, other than those provided by statute, and the only manner in which the collector can proceed against personal property for taxes due on it, is, after the required demand and notice, to seize it as directed by the revenue law, and there can be no lien on it before seizure.

Appeal from Clinton Circuit Court.—Hon. Geo. W. Dunn, Judge.

REVERSED.

Crosby Johnson for appellant.

The writ of attachment was void for want of an attachment bond. The action should have been brought against the owner of the property. The title to the goods had passed to Ayler, and the railroad company was his agent. Rickey v. Zappenfeldt, 64 Mo. 277; Comstock v. Affelter, 50 Mo. 411; Erwin v. Arthur, 61 Mo. 386; Magruder v. Gags, 33 Md. 344; Krudler v. Ellison, 47 N. Y. 36. The tax law does not authorize a suit by attachment in aid of pro-

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ceedings to collect taxes. R. S. 1879, §§ 6754, 6826, 6831, The collector can take no step 6836, 6837, 6838, 6839. which is not provided by statute. McPike v. Pen, 51 Mo. 63; Alexander v. Helfer, 35 Mo. 334; Board, etc., v. Mining Co., 18 W. Va. 441. If the State had a lien on the attached property, attachment was not the remedy, but injunction or prohibition. Price v. Roetzell, 56 Mo. 500; Ware v. Johnson, 55 Mo. 500; Bank v. Kercheval, 65 Mo. 682. Where the statute gives a remedy, parties are restricted to it. Cooley on Tax., 13; Cooley on Torts, 653; State v. Marlow, 15 Ohio St. 114; Wetmore v. Tracy. 28 Am. Dec. 525; Moore v. White, 45 Mo. 206. The State has no lien on personalty for taxes until seized by the collector. State v. Rowse, 49 Mo. 586; Rice v. Powell, 44 Mo. 436; Norris v. Brunswick, 73 Mo. 256; R. S., § 2361; Anderson v. State, 25 Miss. 495; State v. St. L., K. C. & N. R'y Co., 77 Mo. 202. The machinery not being specially adapted to that particular structure, did not become a fixture. Hunt v. Mullanphy, 1 Mo. 508; Burk v. Baxter, 3 Mo. 207; Lacey v. Gibony, 36 Mo. 320; Haeussler v. Glass Co., 52 Mo. 452; Graves v. Pierce, 53 Mo. 423. A statutory lien on land confers no property in the land itself, but simply gives a right to levy on the land to the exclusion of intervening adverse interests. Freeman on Judg., § 338; Waple's Proceedings in Rem, § 232; Seibert v. Copp, 62 Mo. 182. Until levy of execution, there is no such interest in the property as the law will recognize or protect. Warner v. Veitch, 2 Mo. App. 459; Conrad v. Ins. Co., 1 Pet. 443; Buckout v. Swift, 27 Cal. 433; Smith v. Wagoner, 50 Wis. 155; Priestly v. Johnson, 67 Mo. 632; Wells on Replevin, § 69.

J. M. Lowe for respondent.

HOUGH, C. J.—On the 21st day of March, 1880, the plaintiff instituted a suit in the circuit court of Clinton county against the defendant, Goodnow, for the purpose of enforcing the lien of the State for the taxes of 1878, amount-

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ing to \$138.60, on lot 1, block 37, in the town of Lathrop in said county. After setting forth the facts necessary to obtain a judgment enforcing the lien of the State on the lot, the petition concludes as follows: "That there was during the above year for which taxes were assessed a steam flouring mill situated on said tract of land, and that said mill was, on the —— day of October, 1879, burned down and destroyed, and the defendant is now about to ship the boiler and other valuable materials and fixtures out of this county. That said tract of land is now not worth the amount of the taxes so assessed as aforesaid, unless said boiler and other materials and fixtures belonging to said mill are attached and held, and that plaintiff has not the time to make the demand and give the notice required by the statutes before seizing and selling said property."

The prayer was for judgment, for taxes with interest, cost and commissions, and that the same be declared a lien on the land, and the lien enforced and the land sold to satisfy the judgment. An affidavit for an attachment accompanied this petition, and a writ of attachment was issued and levied upon the engine, boiler and machinery attached thereto. The defendant, Ayler, filed an interplea, claiming said engine, boiler and machinery as his by virtue of a purchase thereof from said Goodnow, on the 2nd day of March, 1880, for the sum of \$500 paid in cash, and a note for \$300 payable in six months thereafter. The case was tried upon the following agreed statement of facts:

"It is hereby agreed that in 1878, and for several years prior thereto, defendant, Goodnow, was the owner of lot 1, block 37 in the town of Lathrop, Clinton county, and that there was on said lot a structure known as a steam flouring mill, and that the engine, boiler and machinery described in the interplea was placed in said mill in the usual form for the purpose of supplying the motive power of said mill. That said mill was burned and destroyed in October, 1879, and that after its destruction said engine, boiler and machinery were stored upon the lot and remained there until

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about March 1st, 1880, when interpleader entered into negotiations with Goodnow for their purchase, which negotiations ended in the sale of said property by Goodnow to interpleader, at the time and for the price stated in the interplea. That interpleader at the time of purchasing said property knew that said property had been used to run said mill prior to its destruction, but had no knowledge or information in relation to the taxes due on said lot. That after the purchase of said property the same was removed from said lot to the station in Lathrop, and was then and there loaded on a flat-car on the line of the Hannibal & St. Joseph Railroad Company, for shipment to interpleader at Joplin, Missouri. That while said property was on said car this suit was begun, and the property attached by virtue of writ of attachment issued out of this court; that in the attachment suit no attachment bond was given by plaintiff."

The interpleader then asked the following declarations

of law:

1. Under the agreed statement the property in dispute did not become a fixture, and never was bound for payment of the taxes of the mill lot.

2. When the mill burned down the property in dis-

pute became and remained personal property.

3. When the mill burned down and Goodnow had sold the property in dispute to interpleader, and it was removed from the mill lot, it became personal property and was discharged from the lien for taxes.

4. After the property in question had been sold for a valuable consideration to interpleader, and it had been removed from the mill lot for shipment, it could not be seized for taxes due from Goodnow on account of the mill lot.

5. An action of attachment will not lie to enforce or aid the State's lien for taxes on real estate.

6. The attachment writ was void for want of a bond. Under the agreed statement and in the absence of testimony showing the contrary, we shall regard the engine and boilers as fixtures. The owner of the land has un-

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doubted right to sever fixtures from the freehold, and they may be severed and lose their character as fixtures by accident. When the mill burned down and the property in controversy was removed from its place, it became personalty and subject to sale and transfer as such. Whatever may be the rule as between mortgageor and mortgagee in such cases, we are of opinion that the lien of the State for taxes on the realty did not and could not follow the severed fixtures as personal property. Vide Ewell on Fixtures, 49. Whether the State authorities may institute legal proceedings to restrain the owner from removing fixtures when such removal will reduce the value of the realty to less than the amount of the taxes, is a question not now before us. The inconvenience of such a rule would, perhaps, of itself be a sufficient argument against it. In this case the collector has recognized the change which has taken place in the character of this property by seizing it under a writ of attachment as personalty. We are not aware of any provision in the revenue law which authorizes a suit by attachment for the seizure, condemnation and sale of personalty The general rule undoubtedly is, that no means can be resorted to to coerce the payment of taxes other than those pointed out in the statute. Carondelet v. Ficot, 38 Mo. 125. The property in question being personalty at the time of its sale to the interpleader and its seizure by the sheriff, the only manner in which the collector could proceed against it for taxes due on it was, after the required demand and notice, to seize the property as directed by the revenue law. Being personalty, there could be no lien on it before seizure. State to use of Philips v. Rowse, 49 Mo. 586. There being no lien on the property and the interpleader having purchased it in good faith, he acquired the title thereto free from any lien which may have attached to it when it was part of the realty. It is unnecessary to determine whether, under section 402 of the Revised Statutes, a bond should have been given by the collector before the writ of attachment was issued.

The judgment will be reversed and the cause remanded, with directions to enter judgment for the interpleader. All the judges concur.

GOODWIN et al., v. KERR; SCARRITT, Interpleader, Appellant.

- Assignment: Possession: FRAUD. Retention of possession of personal property by the assignor after assignment for benefit of creditors, is not per se fraudulent, and does not render the assignment void.
- 2. Assignor and Assignee: SUBSEQUENT AGREEMENT. An assignment for benefit of creditors, free from fraud in its inception, duly executed, acknowledged and recorded, is not invalidated by a subsequent agreement between the assignor and assignee to disregard it, or by subsequent fraudulent acts on their part with respect to the assigned property.
- Evidence. The conduct of the assignor and assignee subsequent to the assignment, is a matter for the consideration of the jury in determining whether the assignment was fraudulent in its inception.

Appeal from Jackson Circuit Court.—Hon. F. M. BINCK Judge.

REVERSED.

Botsford & Williams and Scarritt & Scarritt for appellant.

Fraud, to have the effect to vitiate the assignment must exist at the time the assignment is made. Shep. Touch., 67; Bump Fraud. Conveyances, (3 Ed.) p. 359, and cases cited. The acts of the assignor and assignee, after the assignment had been executed, acknowledged and recorded, either in refusing to carry it into further effect or attempting to rescind and abandon it, did not destroy the trust in favor of the creditors, or operate to divest the title out of the assignee and re-vest it in the assignor. Gates v.

Lebeaume, 19 Mo. 17; Hardcastle v. Fisher, 24 Mo. 70; Pinneo v. Hart, 30 Mo. 561; Crow v. Beardsley, 68 Mo. 438; Hatcher v. Winters, 71 Mo. 30; Read v. Robinson, 6 Watts & Serg. 329; Seal v. Duffy, 4 Barr (Pa.) 274; Mark's Appeal, 85 Pa. St. 231; Alpaugh v. Robinson, 27 N. J. Eq. 96; Burrill on Assign., (3 Ed.) §§ 266, 267, 268, 269, 296, 297, 298. Retention of the assigned property by the assignor did not render the assignment void, an assignment for benefit of creditors not being within the 10th section of our statutes concerning fraudulent conveyances. Keeler v. Tutt, 31 Mo. 307; Benjamin on Sales, p. 1; Chitty on Contracts, (11 Ed.) p. —; Burrill on Assign., § 4; State v. Benoist, 37 Mo. 500; Crow v. Beardsley, 68 Mo. 438; N. Y. Rev. St. 1845, chap. 10, p. 127.

Lathrop & Smith with James Gibson for respondent.

Transfer of the possession of the property to the assignee is essential to the validity of an assignment for the benefit of creditors. Edwards v. Harben, 2 Term. Rep. 587; Burrill on Assign., (3 Ed.) chap. 29, p. 360; Ib., p. 517; Wordall v. Smith, 1 Camp. 332; Rogers v. Vail, 16 Vt. 327; Cunningham v. Neville, 10 S. & R. (Pa.) 251; Beers v. Lyon, 21 Conn. 604, 615; Ramsey v. Stevenson, 5 Martin (La.) O. S. 23; Hughes v. Ellison, 5 Mo. 463; Hatcher v. Winters, 71 Mo. 30, 35, "Every sale" mentioned in section 2505 of Revised Statutes, covers "every assignment," and if it does not, the common law requires possession to accompany every transfer of personal property, and assignments are but conveyances for special purposes. Hamilton v. Russell, 1 Cranch 309; Lowenstein v. Flamand, 82 N. Y. 494, 497. The third, fourth, fifth and sixth instructions for plaintiff are proper. Burrill on Assign., (3 Ed.) §§ 344, 346; Reed r. Pelletier, 28 Mo. 173; State v. Benoist, 37 Mo. 500; Burgert v. Borchert, 59 Mo. 80; Caldwell v. Williams, 1 Ind. 405; Flanigan v. Lampman, 12 Mich. 58.

HENRY, J .- Plaintiffs sued Kerr by attachment in the

special law and equity court of Jackson county, and the attachment was levied upon a stock of goods, (queensware, etc.,) in a storeroom in Kansas City occupied by Kerr as a retail dealer in such goods. Scarritt interpleaded, claiming the goods under an assignment made to one Wm. H. Watts, by Kerr, for the benefit of his creditors, Scarritt having been appointed assignee by the circuit court of Jackson county, to which, by agreement, the cause was transferred.

At the trial it appeared that after the assignment was executed and recorded, Watts proceeded to take an inventory of the goods, but before concluding it Kerr told Watts to discontinue it, as he, Kerr, had been badly advised to make the assignment, and thereupon Watts, an attorney, having advised the assignment, refused to act as assignee, and restored, if he in fact ever had, the possession of the goods to Kerr, who afterward, as before the assignment, sold them at retail and appropriated the proceeds of sales as he thought proper. This continued from about the 5th or 6th of August until the first attachment in this cause was issued. When that attachment was levied, Watts had refused to act and Scarritt had not been appointed in his stead, and Kerr was in possession.

It is unnecessary to make a detailed statement of the evidence, or to embody in this opinion all the instructions given and refused. For plaintiffs seven were given; four-teen asked by interpleader were refused, and four were

given by the court of its own motion.

In the first and seventh given at the plaintiffs' instance, the jury were told in substance that if Watts, the assignee, did not take actual possession of the goods, or if his possession was not visible, continued and exclusive against Kerr, the assignment was void, or if after the assignment and prior to the date of the attachment and before Watts had taken full control and management of said goods, or before Watts had filed his bond and completed an inventory of the goods it was agreed by Kerr and Watts that the assignment should be disregarded, and the possession and

control and disposal of the goods should be with Kerr, who was so in possession of the goods at the date of the attachment, then the interpleader could not recover. Two important propositions of law are contained in these instructions, either of which, if correct, is decisive of this case against the interpleader.

It is first asserted that the retention of the goods assigned by the assignor after the assignment, is per se fraudulent and renders the assignment void. Second, that after an assignment is made with however honest an intent, the assignor and assignee may, by their fraudulent conduct with regard to the property, or by an agreement between them that the assignment should be disregarded and held for naught, followed by a surrender of the possession of the assigned goods by the assignee to the assignor, invalidate the assignment.

As to the first proposition Mr. Burrill, in his work on Assignments, says: "The predominant rule in the United States appears to be that possession must accompany and follow a deed of assignment by a debtor and the possession of the assignor after the transfer, unless explained, will render the assignment void as against creditors." 402, § 277. That "possession is only prima facie and not conclusive evidence of fraud; and that it may always be explained so as to show the transfer to have been bona fide and upon sufficient consideration." Ib., 393, § 273. It must be conceded that this is the law in this State, unless our statute, (§ 10, Wag. Stat., 281,) is applicable to assignments. It provides that: "Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time, (regard being had to the situation of the property,) and be followed by an actual and continued change of the possession of the things sold, shall be held to be fraudulent and void as against the creditors of the vendor and subsequent purchasers in good faith." If an assignment is included in the term "sale," the instructions of the court on this

subject were correct declarations of law. Is an assignment a sale within the sense of section 10, supra? In Kuykendall v. McDonald, 15 Mo. 418, Judge Scott delivering the opinion of the court, observes: "This revives the old question, whether the continuing in possession of personal property after a sale is a fraud in law, and so to be declared by the The contrariety of opinion entertained court. by different courts and the conflicting views in the same courts, in relation to this question, induced the legislature at the late session to interfere and settle it definitely. It was hoped this had been done The 4th section of the act referred to prescribes how gifts of goods may escape the imputation of fraud resulting from a want of possession in the donee. The 8th section shows how deeds of trust and mortgages affected with a charge of fraud growing out of the want of possession in the mortgagee and trustee may avoid a like imputation. But the case of an absolute sale with possession continuing in the vendor, stood on different considerations, and no provision was made for its protection. It was made a presumption of fraud and a conclusive one, unless the jury was satisfied that it was made in good faith without any intent to defraud creditors. The 10th section of the act was borrowed from the code of New York." The statute of New York declared not only that every sale but that every assignment of goods and chattels by way of mortgage, or upon any condition whatever, unless the sale or assignment be accompanied, etc.; and why, when our legislature enacted section 10 it confined its operation to sales, omitting that portion of the section of the New York statute including in express terms assignments, we cannot explain; but evidently there was a reason for it, and the omission furnishes a convincing argument that it was not intended to apply to that class of transfers of property, the same stringent rule that was made applicable to sales of goods and chattels.

Mr. Burrill in his work, states the distinction between a sale and an assignment. One important distinction "arises

out of the character of a trust which belongs to an assignment. A sale in cases free from fraud is on delivery of the things sold and receipt of the consideration a complete transaction, passing absolutely and irrevocably all the seller's interest in the subject of it, without reversion or return under any circumstances." Burrill on Assign., p. 8, § 4; State ex rel. Phillips v. Rowse, 49 Mo. 586. "A sale is a transferring of property from one person to another, in consideration of a sum of money to be paid by the vendee to the vendor." Long on Sales, 1. It is a "transfer of the absolute or general property in a thing for a price in money." Benjamin on Sales, 1. An assignment is no more a sale than is a mortgage, both of which are transfers of the present dominion over the property by the owner to another, and in each of which, if there be a surplus, after the purposes of the conveyance are satisfied, it belongs to the assignor or mortgageor. An assignment bears a stronger resemblance to a mortgage than to a sale, and in view of the palpable distinctions between a sale and an assignment, and of the omission by the legislature from the 10th section of the words in the statute from which it was borrowed. by which assignments were expressly excluded, we are forced to the conclusion that section 10 has no application to assignments. This view is strengthened by the fact that the legislature has, in a chapter devoted to voluntary assignments, required them to be proved or acknowledged and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed, and also required the assignee to give bond with securities to be approved by the circuit court, or judge or clerk thereof in vacation, to inventory the property and have it appraised, and to file his inventory in the office of the clerk of the circuit court, and prescribing his duties in relation to allowing demands of creditors against the property assigned, and to making settlements with the circuit court. A chapter regulating voluntary assignments, substantially the same as in the revision of 1879, will be found in the Revised

Statutes of 1845, and in every subsequent revision, and assignments may have been omitted from section 10 under the impression that the chapter on assignments was all the legislation needed on that subject.

The next question is, can an assignment free from fraud in its inception duly executed, acknowledged and recorded be invalidated by a subsequent agreement between the assignor and assignee to disregard it and hold it for naught, or by any fraudulent acts on their part with respect to the property assigned? "Another rule (says Mr. Burrill) is, that the character of the assignment will not be affected by subsequent events, and if valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it." In Gates v. Lebeaume, 19 Mo. 17, it was declared that the character of the assignment will not be affected by subsequent events, and, if valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it. The instructions presenting that view should have been given.

The court properly held that the conduct of the assignee and assignor, subsequent to the assignment, was a matter for the consideration of the jury, in determining whether the assignment was fraudulent in its inception, and the evidence to prove it was admissible. We cannot refrain, however, from expressing the regret that the law is as we are constrained by authority to declare it. The case at bar shows how the rights of creditors may be utterly destroyed, by a fraudulent debtor and an assignee who is willing to aid him in his scheme to delay, hinder and defraud them. We would not be understood as intimating that Mr. Watts, the original assignee, had in view the hindering, delaying or defrauding of Kerr's creditors, but indignant at the conduct of Kerr after the deed of assignment was executed and recorded, but before he had given bond, he refused to act longer as assignee, and the property of course again came into the possession of the assignor, who used and controlled it as if no assignment had ever been

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made. We see no good reason why the same rule on the subject of the possession of the goods sold prescribed by the statute, should not be applied to the case of an assignment of goods and chattels for the benefit of creditors, but that is a matter for the consideration of the legislature.

The judgment is reversed and the cause remanded.

All concur.

GEE V. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Appellant.

Railroad: NEGLECT TO FENCE: EVIDENCE. Direct evidence that stock passed through a defective place in the fence, is not required to sustain an action against a railroad for double damages for injuries to the stock, occasioned by the escape of the latter on the roadway at a place where defendant neglected to maintain a lawful fence.

Appeal from Madison Circuit Court.—Hon. J. H. Nicholson, Judge.

AFFIRMED.

Smith & Krauthoff with T. J. Portis for appellant.

Appellant's refused instructions should have been given. Cecil v. Railroad Co., 47 Mo. 246, and cases cited; Luckie v. Railroad Co., 67 Mo. 245, and cases cited; Shearman & Redfield on Neg., § 462; Nance v. Railroad Co., 79 Mo. 196.

B. B. Cahoon for respondent.

Appellant's instructions were properly refused. Mc-Farland v. Rosenberg, 42 Mo. 439; Deere v. Plant, 42 Mo. 45; Walther v. Railroad Co., 55 Mo. 376, 377; Fickle v. Gee v. St. Louis, Iron Mountain & Southern Railway Company.

Railroad Co., 54 Mo. 225, 226; Aubuchon v. Railroad Co., 52 Mo. 522.

Hough, C. J.—This is a suit to recover damages for injuries inflicted, by an engine and cars of defendant, upon a mule belonging to the plaintiff. The plaintiff had judgment before the justice and in the circuit court, and the defendant has appealed. No objection is made in this court to the sufficiency of the statement, and indeed the only matter alleged as error, is the refusal of the court to give certain instructions asked by the defendant, which will be noticed hereafter.

It appears, from uncontradicted testimony, that the mule in question was in a pasture adjoining the right of way of the defendant, and the fence of the defendant separating the right of way from the pasture, was old, decayed and broken in numerous places; the posts were rotten and would not hold nails; in some places the planks were off, or fastened only at one end. Many panels would not sustain the weight of a man, and could be easily thrown down by slight pressure against them. There were bars also, which were defective and insufficient; they would fall down upon being rubbed against, and were sometimes shaken down by the wind. There is not the slightest intimation in the record, that any other fence around the pasture was defective or insufficient. The mule was shown not to be "breachy;" it was not "a jumping mule." It was last seen at noon in the pasture; and on the following morning at eight o'clock was found near the railroad track badly injured. The testimony tended to show that it was struck by the cars in the night.

The court trying the case without the aid of a jury, declared the law to be, that the defendant was entitled to a reasonable time in which to repair the fence, after notice of any defects therein, before it would be liable for any damages sustained in consequence of such defects. This instruction is more favorable to the defendant than the rule

Gee v. St. Louis, Iron Mountain & Southern Railway Company.

laid down in Clardy v. Railroad Co., 73 Mo. 576, will warrant.

The following declarations of law asked by the defendant, were refused by the court:

3. The court, sitting as a jury, declares the law to be that the defendant is not liable to the plaintiff for injury done his mule by reason of there being no sufficient bars or gates made and erected by defendant at the farm crossing, unless the plaintiff has proved that the mule entered upon the road-bed of defendant's railroad through such bars and was struck and injured by defendant's engines or cars.

4. The court, sitting as a jury, declares the law to be that if the defendant had erected a fence along the sides of its railroad where plaintiff's mule was found hurt, and the fence was broken down at different places, the plaintiff cannot recover without proof showing that the mule entered upon the road-bed of defendant's railroad through one of the places where said fence was broken.

Unless we resort to conjecture and ignore all the testimony delivered at the trial, it is impossible to conceive of any means by which the mule got upon the defendant's track, except through the defective fence or bars between the pasture and the railroad. The court doubtless construed the language employed in both of the refused instructions, to mean, that it devolved upon the plaintiff to prove by direct testimony that the mule escaped from the pasture through one of the broken places in the fence or through the bars, and in view of the testimony adduced, this was doubtless the construction which the defendant's counsel intended they should bear. It is morally certain that the mule did get upon the railroad track in consequence of the defects in the defendant's fence, and the court was warranted in so finding; indeed, the court could not have found otherwise. Direct testimony that the mule passed through a broken place in the fence or through the defectHall v. Allen.

ive bars, onto the defendant's track, is not required, and we see no error in refusing the two instructions asked.

All the judges are of opinion that the judgment of the circuit court should be affirmed.

Hall et al., Appellants, v. Allen.

Set-off: commissions: Assignment. In a suit upon a promissory note where the defendant pleads as a set-off commissions from plaintiffs due a co-partnership, of which he is a member, if the commissions were assigned to defendant, by the co-partnership, before the commencement of the suit, then, for the purposes of a set-off, they were due him, and accorded with the allegation of the answer. And if defendant's co-partners allowed him the commissions individually, with consent of plaintiffs, it was in effect, an assignment with notice.

Appeal from Jackson Special Law and Equity Court.—Hon. R. E. Cowan, Judge.

AFFIRMED.

Amos H. Cagy for appellants.

The instructions for defendant were based upon issues outside of the pleadings. They should have been based upon the pleadings. Waldhier v. Railroad Co., 71 Mo. 514. The instructions given at the instance of the court did not tell the jury what an assignment was, and those given at the instance of the defendant were still more indefinite, and should not have been given. Gilson v. Railroad Co., 76 Mo. 282.

Lathrop & Smith for respondent.

Plaintiffs' demurrer to the evidence was properly refused, as also, were their instructions. The instructions

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given by the court were not excepted to, and those asked by defendant were not even objected to, and defendant is not called upon to defend them. The verdict was not against the evidence, but if it were, it should not be reversed for that reason.

Martin, C.—This was an action on a promissory note in the sum of \$1,030, made by defendant and payable to the plaintiffs under the name and style of "Hall Bros." The petition admitted a credit on the note of \$250. The defendant pleaded a failue of consideration in that the note was given under a mistaken belief that he and his co-partners were indebted to plaintiffs at the time it was given, but that they were not indebted in any amount whatever, which left the note without any consideration. The defendant also pleaded an offset or counter-demand, in which he claimed that plaintiffs were indebted to him in the sum of \$660.50 as commissions for services rendered them in the sale of cattle. The trial resulted in a verdict for defendant with an assessment of \$600 against plaintiffs, upon which judgment was rendered in his favor. The plaintiffs have appealed.

On the first issue of the case relating to the liability of defendant on the note, the evidence very strongly tends to show that there was in truth no indebtedness existing against the defendant and his co-partners for which the note was given. All the instructions asked by the plaint-iffs upon this issue were given. And the instruction given at the instance of defendant, to the effect that if the note was given under the mistaken belief that defendant was indebted to plaintiffs on account of previous transactions, when in truth he was not indebted in any sum whatever, is unobjectionable.

On the second issue relating to the set-off or counterclaim, the evidence shows, without contradiction, that defendant made the sale of cattle on which he claimed commissions, that is, that he procured a purchaser of the cattle Hall v. Allen.

and sent him to plaintiffs, who effected the sale and promised the commissions. But the evidence, also, shows that these services were rendered in the name of and in behalf of the firm of Irwin, Allen & Co., of which defendant was a partner, and that the indebtedness originally accrued in their favor against plaintiffs. There was evidence tending to show that the firm of Irwin, Allen & Co. had recognized the claim for commissions as passing absolutely to Allen alone, and that he had been charged in his individual account with the value and amount thereof, which he claimed passed the title to him. There was also evidence tending to show that by an arrangement between the plaintiffs and the firm of Irwin, Allen & Co., the commissions were to be credited upon Allen's note held by plaintiffs, which it is claimed would pass the title to defendant of the cross-indebtedness pleaded.

The plaintiffs asked an instruction to the effect: the jury believe from the evidence that the item of offset claimed by defendant consisted of commissions due from plaintiffs to the firm of Irwin, Allen & Co., a co-partnership, then such item cannot be allowed as a set-off to plaintiffs' claim." The declaration of law in this instruction is correct enough, but it is hardly suited to the evidence. If the commissions were due the firm of Irwin, Allen & Co., they were not due to defendant for the purposes of an offset. But if they had been assigned or released to him by the other members of the firm of Irwin, Allen & Co., then, for the purposes of an offset they were due to defendant, and accorded well enough with the allegation in the answer, that they were due to defendant. I do not think the court erred in refusing the instruction as asked by plaintiffs, and in giving of its own accord the following instruction in lieu thereof: "If the jury believe from the evidence that the item of offset claimed by the defendant consisted of commissions due from plaintiffs to the firm of Irwin, Allen & Co., a co-partnership, then such item cannot be allowed as a set-off, unless you further believe from the evidence that

such commissions had been assigned to defendant by said firm of Irwin, Allen & Co. before the institution of this suit, or unless you find from the evidence that by an agreement between the plaintiffs and Irwin, Allen & Co., said commissions were credited on the note sued on, and the same charged to defendant's account by the firm of Irwin, Allen & Co."

I think this instruction placed the issue fairly before the jury. The instruction given at the instance of defendant, is not in contradiction of it. There seemed to be no conflict in the evidence about the services having been rendered in the name of Irwin, Allen & Co. In the defendant's instruction the court authorizes a finding in favor of defendant for the value of the services, "provided they find that it was understood that said commissions should be allowed to the defendant herein individually." There is nothing indefinite in this instruction when considered with reference to the evidence to which it applies. The evidence was, that defendant's co-partners had allowed him these commissions individually, with the consent of plaintiffs. This was in effect an assignment of their interest to him with notice of the fact to the plaintiffs, from whom they were due.

I see no error which would justify a reversal of the judgment, accordingly it is affirmed. All concur.

QUIGLEY V. THE MEXICO SOUTHERN BANK, Appellant,

1. Attorney: NOTE HELD FOR COLLECTION ONLY: SALE WITHOUT AUTHORITY: LIABILITY OF PUECHASER. A bank is liable for the money collected on a note, where it was placed by the owner in the hands of an attorney for collection only, and the attorney, without the owner's authority, indorsed the latter's name thereon and sold it to the bank, which collected it from the maker; and this is true, although the bank was ignorant of the unauthorized indorsement and

purchased the note in good faith for a full consideration and before maturity.

2. Personal Judgments: who concluded: Publication: Statute. Personal judgments conclude only parties and their privies, and cannot be invoked by strangers nor pleaded by them; nor can one be made a party to a suit under Revised Statutes, section 3499, when the petition and order of publication do not conform to the requirements of said section.

Appeal from Audrain Circuit Court.—Hon. Elijah Robinson, Judge.

AFFIRMED.

Plaintiff, respondent here, sued defendant for money collected on a note made payable to the order of plaintiff, and signed by one William H. Woolwine as maker, which money so collected plaintiff averred had not been paid over to him. Defendant answered, setting up 1st, A general denial; 2nd, A special plea of res adjudicata.

Upon the trial there was evidence tending to show that plaintiff had left the note in controversy with one Henry S. Clark, an attorney, for collection only, and that he delivered it to said attorney without any indorsement, and took his receipt for it with other notes; that said Clark afterward, without plaintiff's authority, indorsed the latter's name on the note, and after, also, indorsing his (Clark's) own name on the note sold it to defendant as his own property. Plaintiff claimed the indorsement of his name by Clark to be a forgery, which defendant denied.

The second defense, viz: that of res adjudicata, arose out of the following facts, as appears by the record:

Plaintiff, in 1873, on the 15th day of November, sold to one William H. Woolwine, a piece of land, and said Woolwine executed his five promissory notes for the purchase money, four of said notes being for the sum of \$200 each, due in one, two, three and four years from date, respectively, and one for \$650, due in five years after date. After all of said notes became due Woolwine not being

able to find the two last named notes of, the series, instituted suit setting up the execution of the above notes, and also a deed of trust on certain land conveyed to secure the notes, the payment of the three first which had matured, and that the remaining notes were due and outstanding and remained an incumbrance on his land. He tendered the amount due on said notes and asked for a decree satisfying the deed of trust. He sued respondent herein and others, as "unknown defendants," respondent being a non-resident; notice of said suit was given by publication, in which notice it was stated the object and general nature was to get an order to pay off certain notes "lost or destroyed and described as Then follows the description, describing the last two notes of the series (neither of which is the note in controversy), and he asked to have removed the incumbrance on the land described, and conveyed to secure said notes. Respondent in this suit, filed his answer therein, and admitted the execution of the notes and deed of trust. and denied payment of any of the notes in said series, except the first, and averred that he delivered said notes to one Clark for collection only, and without indorsement, and if plaintiff had paid off said notes to any other than to his attorney, it was void as to plaintiff, and offered to satisfy said deed of trust upon the payment of said notes, and further answered that said notes, each and all of them, were beyond the control of plaintiff, and were either lost or Upon trial had it was shown by Woolwine destroyed. that he had paid off and taken up the first three notes of the series, (the last of which is the note involved in this suit, and which was paid to appellant as its owner and holder,) and the court ordered said Woolwine to pay off the two remaining notes to respondent, and decreed that said incumbrance from said land be removed and canceled.

The court gave the following instructions at plaintiff's request against appellant's objection:

1. If the jury believe from the evidence in the case that the note in dispute was left with Henry S. Clark for

collection only, and when so left plaintiff's name was not written thereon, that afterward said Clark, without authority from plaintiff, wrote his (plaintiff's) name on the back of the note, and without authority from plaintiff, sold and assigned the same to defendant, received the money therefor, and never paid to plaintiff the amount so collected, then the verdict should be for plaintiff for the amount of the note when collected, with six per cent interest thereon from the institution of this suit, to-wit, December 27th, 1879, to the present time, though they may further believe from the evidence that defendant was ignorant of such unauthorized indorsement, and purchased the note in good faith for full consideration before maturity.

2. The court instructs the jury that nothing contained in the record of the suit of Woolwine against Quigley and others, read in evidence, can operate as an estoppel to plaintiff's action in this case, and the jury are instructed to disregard all of said record evidence, and the same is with-

drawn from their consideration.

The court, at appellant's request, gave the following instructions:

- 1. If the jury shall believe from the evidence in this case, that before the maturity of the note in dispute the defendant purchased and paid for said note in good faith, of the holder, H. S. Clark, and said note had been and then was indorsed by the plaintiff, either in person or by his authority, permission or consent, then the verdict must be for the defendant.
- 2. If the jury shall believe from the evidence in the case that the plaintiff indorsed the note in dispute, and left the same so indorsed with the said Henry S. Clark to hold and collect, or to discount and sell the same, or for any other purpose, and afterward, but before the same became due, the defendant, in good faith and for a valuable consideration, purchased said note so indorsed, and paid the purchase price thereof, then the verdict must be for the defendant, although the jury may believe from the evidence

in the case that said plaintiff gave the said Clark no directions to sell or to make any other disposition of the same.

3. The court instructs the jury that the burden of proof is upon the plaintiff to show that the name of the payee, Quigley, on the back of the note in dispute, was and is a forgery, and unless the plaintiff satisfies the jury by a preponderance of evidence in the case of this fact, then the verdict must be for the defendant.

Forrist & Fry for appellant.

Clark was the general agent for respondent as to the notes and deed of trust, and the real question, which was one for the jury, was whether, in selling the note to appellant, he was acting within the scope of his authority, and whether, under all the facts and circumstances, the respondent or appellant should bear the loss resulting from Clark's alleged misconduct. The first instruction for plaintiff withdrew these matters from the jury, and was, therefore, erroncous. Davis v. Carson, 69 Mo. 80, and cases cited; Ewell's Evans on Principal and Agent, side pages 2, 3; Story on Agency, (2 Ed.) § 443; Rice v. Groffman, 56 Mo. 435; Whelan v. Reilly, 61 Mo. 565. The court erred in excluding from the jury the record in Woolwine v. Quigley. 60 Mo. 25. 58 Mo. 61; Iowa v. Etna, etc., 14 Conn. 501; Kingley v. Davis, 104 Mass. 178; St. Louis Mut., etc., v. Cravens, 69 Mo. 77; 1 Greenleaf Ev., §§ 527, 527 a; Freeman on Judg., §§ 417, 607, et seq.

T. B. Buckner with Macfarlane & Trimble for respondent.

An attorney, for collection only, has no power to sell, and a purchaser from him receives no title. Goodfellow v. Landis, 36 Mo. 168; Smith v. Johnson, 71 Mo. 382. On an instrument payable to "order," the indorsement of the payee is necessary to transfer the legal title. 1 Daniel Neg. Inst., § 664; Hopkins v. Page, 2 Brock. 20; Hestene v. Will-

iamson, 2 Bibb 83; Russell v. Swon, 16 Mass. 314; Blakely v. Grant, 6 Mass. 388. The record in suit of Woolwine v. Quiğleg was properly excluded from the jury, appellant not having b eena party thereto.

Sherwood, J.—Action by Quigley to recover from the bank the amount due on a promissory note, which had been collected by the bank from Woolwine, the maker, Quigley being the payee and the note payable to his order. The bank claimed to be an innocent holder. There was testimony that the note in question was left with H. S. Clark, an attorney, for collection, and for no other purpose. There was testimony also that the note was not indorsed by the payee, and there was testimony of a contrary effect. The testimony also tended to show that the bank was a purchaser of the note before maturity, and for value, and that the name of Quigley was indorsed on the note.

The court instructed the jury, on the part of plaintiff, in substance, that if the note was left with Clark for collection only, and without plaintiff's indorsement, and Clark, without authority from plaintiff, indorsed the name of the latter on the note and sold the same to the bank, and afterward the latter collected the note and never paid the proceeds to plaintiff, then the jury should find for the plaintiff, although they should believe from the evidence that the bank was ignorant respecting such unauthorized indorsement, and purchased the note in good faith for a full consideration and before maturity.

The instructions in behalf of the bank were to the effect that if the note was purchased by it, in good faith and for a valuable consideration of Clark, and the note at the time of the purchase was indorsed either by the plaintiff, or by his authority, that the finding should be for the defendant, even though the evidence showed that Clark had no authority to sell the note. And the third instruction for the defendant told the jury that the burden of proof was on the plaintiff to show, by a preponderance of evidence, that

the indorsement of Quigley's name was a forgery. These instructions put the case very fairly to the jury. Perhaps, the last instruction went further than the law warrants, but as the judgment went in favor of plaintiff, it is unnecessary to comment on any supposed error which it may contain.

I.

Where a principal clothes his agent with apparent title to a negotiable security, as, ex. gr., by indorsing such a note in blank, and the agent, contrary to the commands of his principal, negotiates the note to one who purchases in good faith, before maturity, and for a valuable consideration, the act of the agent, though wholly unauthorized, will bind the principal as effectually as if no defect of authority existed. Story on Agency, § 443. For in such cases where one of two innocent persons must suffer, the one must be the sufferer who gave occasion to the commission of the wrong. Ib.

But if the testimony offered on behalf of the plaintiff be true, Clark had neither real nor apparent authority to transfer the note. If the indorsement was a forgery, the case stands here as if the instrument bore no indorsement at all. An attorney, who receives a note merely for collection, has no authority to make any other disposition of it. Goodfellow v. Landis, 36 Mo. 168; Smith v. Johnson, 71 Mo. 382. So that taking the testimony offered by plaintiff as true, the bank bought the note from one not authorized to sell it, and from one not possessing an apparent title. When a note payable "to order" is not indorsed by the payee, the transferee does not acquire the legal but only the equitable title, (1 Dan. on Neg. Inst., §§ 664 a, 741); and the transferee takes it as a new chose in action, and must aver and prove the consideration, and takes it subject to all the equities which attached to it in the hands of his transferer. Ib: Boeka v. Nuella, 28 Mo. 181. And though under our code the transferee may maintain an action on the note in his own name, where the transfer occurs by mere delivery.

this ability to sue in his own name cannot confer on him the rights or the status of him who has purchased an instrument transferable by mere delivery, or one payable to order and indorsed in blank. 1 Daniel Neg. Inst., supra; 1b., §§ 321, 573. In short, such purchaser is not to be regarded as an indorser in the usual course of business. 1b., §§ 621, 781 a. For these reasons the instructions on which we have commented furnish defendant no just ground for complaint.

II.

Nor was there any error in the instruction which the court gave, that nothing contained in the record of the suit of Woolwine v. Quigley estopped the plaintiff in this action, and withdrew such record evidence from the consideration of the jury. The bank was not a party to that suit, and "it is a general principle fundamental to the doctrine of res judicata, that personal judgments conclude only parties to them and their privies," (Bigelow on Estop., 59; 1 Greenleaf Ev., § 535); and cannot be invoked by strangers nor pleaded by them. Freeman on Judg., § 154; Henry v. Woods, 77 Mo. 277; McDonald v. Matney, (decided present term).

Ш.

Nor can the bank be regarded as made a party to that suit, because of the publication made, and, the petition filed being insufficient. The petition alleges that the "notes are either lost or destroyed, or that said notes have been assigned and delivered by defendant Quigley, or his agent, to and are held by parties to this plaintiff unknown," and that "the residence of the unknown defendants herein are unknown to plaintiff." This petition, it will be observed, does not comply with the provisions of section 3499, Revised Statutes 1879. Nor does the order of publication show any better compliance with that section, since it merely notifies "non-resident defendant Quigley and others unknown." See State v. Staley, 76 Mo. 158.

IV.

Furthermore, that publication only relates to the last two of the notes, and not to the one in suit.

V.

Moreover, the section of the statute referred to requires that in cases of this sort, where there are persons whose names are unknown to the plaintiff, he must make the proper allegation under oath. This was not done. His attorney made oath to the petition. It will be observed that the section in question differs from section 3494, for there the affidavit may be made by the "plaintiff or some person for him." "In all cases where constructive notice is substituted for actual notice, strict compliance is required." Schell v. Leland, 45 Mo. 289.

For these reasons the judgment should be affirmed.
All concur.

GLASS et al. v. GELVIN, Appellant.

- 1. Delivery: QUESTION OF LAW OR FACT. When there is no dispute as to the facts, the question of delivery is one of law, but where there is a conflict in the evidence it is a question of fact for the jury.
- Possession: Vendor: Vender: Agent. A vendor may sell goods in the possession of his agent or bailee, and transfer a valid title, the possession of the agent then becoming the possession of the vendee.
- Recovery: PLEADING: INSTRUCTION. Recovery can only be had upon the case made by the pleadings. The issues cannot be changed by an instruction.

Appeal from Holt Circuit Court.—Hon. H. S. Kelley, Judge.

LEVERSED.

T. H. Parrish for appellant

There was no such delivery as would excuse the plaintiffs from furnishing the number of hogs sold at the time they were to be weighed, and the instructions of the court upon that point were erroneous. Williams v. Evans, 39 Mo. 202; Means v. Williamson, 37 Me. 556; Howdlett v. Tallman, 14 Me. 400. As a general rule the seller is bound to deliver the exact quantity contracted for. If more or less is tendered, the buyer may refuse to accept any. Hart v. Mills, 15 M. & W. 85; Cundiff v. Harrison, 6 Exch. 903; Rommel v. Wingate, 103 Mass. 327; Rockford R. R. Co. v. Lent, 63 Ill. 288; Wilson v. Wagner, 26 Mich. 452. Until Fisher was notified of the contract, he held the hogs as bailee of plaintiffs. Harvy v. St. Louis Butchers, etc., 39 Mo. 208, 218; Upton v. Jamison, 73 Mo. 234; Benjamin on Sales, p. 672, note a; Russell v. O'Brien, 127 Mass. 348; Carter v. Willard, 19 Pick. 1; Bullard v. Wait, 16 Gray 55; McCormick v. Hadden, 37 Ill. 370. The court erred in submitting the case to the jury upon other issues than those made in the pleadings. Bullene v. Smith, 73 Mo. 151; Price v. Railroad Co., 72 Mo. 414; Bank v. Murdock, 62 Mo. 70; Bank v. Armstrong, 62 Mo. 59; Waldhier v. Railroad Co., 71 Mo. 514. If the facts charged in the petition were true, plaintiffs' remedy was an action for the contract price of the hogs, and they cannot recover for a failure of defendant to accept. Chapman v. Ingram, 30 Wis. 290; Hart v. Tyler, 15 Pick. 171; Story on Sales, § 441; Benjamin on Sales, § 764.

Ewing, C.—Respondents sued the appellant in the circuit court of Holt county, and alleged in substance that: They were partners and stock dealers, and shipped to Chicago 345 head of fat hogs to one Fisher, a commission merchant, who was to sell them for plaintiffs; that Glass, one of the plaintiffs, went to Chicago, and after negotiation, sold them to defendant, Gelvin, for \$4.60 per hundred, and

a part of the contract of sale was, that defendant was to receive the hogs in Fisher's hands, and was to make Fisher his agent and to pay all charges; that the plaintiffs delivered and defendant received the hogs in Fisher's hands, and gave him instructions for their sale. That defendant refused to pay for the hogs, but abandoned them, and that Fisher, as defendant's agent, sold the hogs for the best price he could, and after paying all charges, (stating the amount,) then paid the remainder, \$3,370.39, to plaintiffs, leaving a balance due them of \$724.53. The answer was a general denial.

The evidence, on the part of plaintiffs, tended to prove that when the sale was made, about nine o'clock in the forenoon, Glass and Gelvin went to the stock-yards, and the hogs were all there, but Fisher was not; that they returned about eleven o'clock and found Garrett, Fisher's salesman, in the pens; told him the hogs were sold to Gelvin; that Garrett then said to Gelvin, "Then I may consider myself acting under your orders," and Gelvin said "Yes;" Garrett then said he had sold 110 head of them; Gelvin did not object, and then gave Garrett instructions about the hogs. They were to be weighed between twelve and two o'clock. That Gelvin went to Fisher and told him he had bought Glass' hogs, and that a part of the light ones had been sold out, and made a bargain with Fisher to "handle" the hogs for him, the same as he was for Mr. Glass.

The evidence, on the part of the plaintiffs, tended to prove all the allegations of their petition, except that "Fisher, as such consignee and agent of said defendant, sold and disposed of said hogs for the defendant." As to this allegation plaintiff Glass testified: "I ordered Mr. Fisher to sell them. He did so. He sold them for me, at my request, and not for Mr. Gelvin, and the proceeds were applied on my contract with Gelvin. Hogs were going down and they were sold next day after my sale to Gelvin. Fisher

· . Test.

sold the 110 head before Gelvin or myself saw him, after I had sold to Gelvin."

The evidence, on the part of the defendant, tended to prove that when he found Fisher had sold 110 head of the hogs he refused to take the others, although Glass offered to turn over to him the receipts for those sold; that defendant was willing to carry out the contract if the whole number was furnished; that hogs were declining, etc.

I. The first question raised by the appellant is as to the delivery of the hogs after the sale. "When the law can pronounce upon a state of facts that there is or is not a delivery and acceptance, it is a question of law, to be decided by the court. But where there may be uncertainty and difficulty in determining the true intent of the parties respecting the delivery and acceptance from the facts proved, the question of acceptance is to be decided by the jury." Howdlett v. Tallman, 14 Me. 400. When there is no dispute as to the facts, it is a question of law. When the evidence is conflicting, the jury must decide. Hatch r. Bayley, 12 Cush. 29; Williams v. Gray, 39 Mo. 201. In this case the facts were in dispute, there was conflicting evidence; the plaintiffs' evidence tending to prove one thing, and the defendant's just the reverse. This question was, we think, fairly submitted to the jury by the instructions, and their action as to this point must be conclusive.

II. The second point made by the appellant is, in substance, as the first. It is a question of fact as to delivery and acceptance of possession. If the facts are as the defendant's evidence tends to prove, then the authorities cited are in point; but the facts being in dispute, the question is with the jury. The statute of frauds was not pleaded. *Graff v. Foster*, 67 Mo. 512. And if it had been, and the hogs were sold and possession delivered, it would not avail. A vendor may sell goods in the possession of his agent or bailee; and transfer a valid title; and the possession of the bailee then becomes the possession of the vendee. *Erwin v. Arthur*, 61 Mo. 386.

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The appellant insists that the instructions of the III. court submitted the case to the jury on other issues than those made by the pleadings. The first instruction contains, among other unobjectionable things, that if "it was a part of the contract that said hogs were to remain in the care of Fisher, as the agent of defendant, to sell and dispose of the same, and that the defendant afterward refused to take them, but abandoned the contract, and the hogs were afterward sold by said Fisher, by direction of plaintiffs, and the proceeds paid over to plaintiffs," the jury should find, The petition alleges that said defendant "has wholly failed and refused to pay plaintiffs for said hogs so purchased of plaintiffs by him, in the said stock-yards, and in the hands of said consignee, Fisher, and wholly abandoned them; that said Fisher, as such consignee and agent of said defendant, sold and disposed of said hogs for defendant," There is no variance between this instruction and the pleading. The evidence tends to prove that defendant did abandon the contract, and that the hogs were sold by Fisher for his account, and the proceeds paid to plaintiffs. instruction substantially submits the same question to the jury.

All that part of the second instruction material to consider, is as follows: "If the jury believe from the evidence that the plaintiffs contracted and sold to the defendant a certain number and lot of hogs, at a certain price, and at the time of the sale a part of the hogs had been sold to other persons by the agent of plaintiffs, and that the defendant thereupon refused to take the remainder of said hogs because the whole number bought were not there, the jury should find for the defendant; but if the hogs were all there when the contract was made, and it was a part of the contract that the hogs should remain with Fisher & Co., and they should continue as the agent of the defendant; this was a valid sale, and the fact that a part of them were afterward sold by said Fisher's salesman before they were weighed, would not release defendant from the con-

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tract. Or if a part of the hogs had been sold by said salesman, and upon learning that fact defendant agreed to and acquiesced in that sale, and gave instructions to said Fisher, or his said salesman, as to the sale of the balance of the hogs remaining in Fisher & Co.'s possession, then, and in that case, the defendant would be bound by the contract."

The second clause of this instruction is objected to because it submits to the jury the question of acquiescence by the defendant in the sale made by Fisher, whereas there is no such allegation in the petition. The petition simply alleges a sale and delivery of the hogs in Fisher's hands, and an acceptance by the defendant in the agent's hands. The defendant denied it. This was the issue. Now the plaintiff seeks to say, by this instruction, that if my allegations are not true, nevertheless the defendant ratified and acquiesced in the sale by Fisher, and is, therefore, liable. The evidence tended to prove that when Glass and the defendant Gelvin went to see the hogs, and ascertained that part of them had been sold, he did not object, but gave Fisher, the commission merchant, instructions concerning them. In the case of the Capital Bank v. Armstrong, 62 Mo. 59, the defendant Armstrong was sued as the indorser of a note; he answered, alleging that certain words were inserted in the note after he signed it, without his authority, and it was, therefore, void as to him. The reply denied the new matter contained in the answer. The case was tried on these pleadings, but the evidence tended to prove a ratification by Armstrong after learning the change had been made. The plaintiff sought to submit the question of ratification to the jury by an instruction. The court say the case was tried on the theory of the pleadings, and it is too late to ask an instruction on the theory of subsequent ratification. A party can only recover on the case he makes in his pleading. Moffat v. Conklin, 35 Mo. 453. In this case the petition presents no such issues as that of a subsequent ratification by defendant; and plaintiffs cannot recover if it turns out that a ratification by defendant after

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the sale is the true position of affairs. Iron Mt. Bank v. Murdock & Armstrong, 62 Mo. 70; Wade v. Hardy, 75 Mo. 394. The circuit court erred in giving the second instruction for the plaintiff; the issues cannot be changed by an instruction; they must abide the pleading.

The judgment is reversed and the cause remanded.

All concurring.

THE STATE V. WILSON, Appellant.

- 1. Statutory Construction: LICENSE: DRUGGIST: MEDICATED BITTERS. Medicated bitters called "Dr. Wilson's Rocky Mountain Herb Bitters," and containing alcohol, are, within the prohibition of section one, acts of General Assembly of 1879, (Acts, p. 166,) (R. S., § 5472,) against dealers in drugs and medicines selling or giving away intoxicating liquors or medicated bitters containing alcohol, without having a dramshop keeper's license.
- 2. ______. Nor can such dealer claim exemption in favor of his bitters under sec 3 of said act, (R. S., § 5474). The exemption mentioned in that section refers to the use of liquors by a druggist in the admixture of necessary remedial compounds, as they are required in the ordinary business of a druggist, and not to an admixture which results in a compound popularly known as "bitters," and as such called for and used as an alcoholic beverage.

Appeal from Adair Circuit Court.—Hon. Andrew Ellison, Judge.

AFFIRMED.

D. H. McIntyre, Attorney General, for the State.

The bitters sold were "medicated bitters containing alcohol," and druggists were prohibited from selling them by section 1, page 166, Laws 1879. The only provision of law then in force (1880) under which defendant could claim the right to sell such bitters as is agreed were sold, is that

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part of section 3, page 166, Laws 1879, which says: "Such dealer in drugs and medicines may sell or give away, in liquors of any kind when the any quantity are used solely in the admixture of same * ." It is evident necessary remedial compounds that the section last quoted was only intended to give druggists authority to sell liquors to physicians and others for the ordinary compounding and preparation of medicines, in like manner as in the "preparation of tinctures," and that it was never intended to give them the right to use it as an ingredient in a medicated bitters prepared by them for general sale. Any other interpretation of the exception in the 3rd section, would render the prohibition to sell "medicated bitters" contained in the 1st nugatory.

Martin, C.—The defendant was indicted at the October term, 1880, of the circuit court of Adair county, for selling intoxicating liquor as a druggist in less quantity than one gallon. He pleaded "not guilty," and the cause was tried by the court sitting as a jury at the February term, 1881.

The following agreed statement of facts was submitted to the court:

1. That defendant sold one pint bottle of "Dr. Wilson's Rocky Mountain Herb Bitters," as charged in the indictment. 2. That said bitters are intoxicating to a certain extent, and contain aicohol. 3. That said bitters contain cinchona, columbo, gentian, quassia, orange peel, anise, coriander seed, ginseng syrup, alcohol and water. 4. That all the above mentioned articles in number 3 are good and genuine medicines of great medicinal virtue, and possess great and genuine medicinal properties. 5. That the alcohol used was only sufficient and for the purpose of securing and preserving the medicinal properties of the aforesaid medicine, and that the alcohol so employed is a necessary and constituent element to obtain and preserve the medicinal qualities of the aforesaid medicine so employed in their

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composition. 6. That the defendant is a druggist and engaged in said business in the town of Kirksville, and that he is the owner and proprietor of a drug store in said town.

The defendant, in addition to the above, testified that the bitters in question were prepared and sold by him in good faith as a medicine, and not for the purpose of evading the liquor law, and that he was not a registered physician. Dr. F. A. Grove testified that he was a druggist and regular registered physician and surgeon, and that he had examined the formula of said bitters; that they were a good remedy for several enumerated diseases and as a tonic and invigorator equal to the best.

A letter from United States Commissioner of Internal Revenue was read in evidence, stating that it was the opinion of the commissioner that said bitters should be classed as medicinal for purposes of taxation under the internal revenue laws, and that when properly stamped, they might be sold without rendering the vendor liable to pay special tax as a liquor dealer.

The court found defendant guilty, and assessed his fine at the sum of \$40, on the 25th of February, 1881. Motions for new trial and in arrest of judgment were filed in due time, and overruled by the court, whereupon the defendant made application for an appeal to this court, which was granted.

On the 19th of April, 1881, the defendant filed an application in the Supreme Court asking that the case be advanced on the docket, which was denied by the court. Since this action of the court the defendant does not seem to have paid any further attention to his defense. No statement or brief appears on file in his behalf. The case seems to have been brought up for the purpose of obtaining a construction of the act of the general assembly relating to the sale of liquor by druggists, approved May 19th, session acts 1879, page 166. It is our opinion that this act of the legislature was intended to apply to just

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such compounds as appear from the evidence to constitute "Dr. Wilson's Rocky Mountain Herb Bitters."

The first section of that act provides that "no dealer in drugs and medicines shall, directly or indirectly, sell or give away any intoxicating liquors, and medicated bitters containing alcohol, in any quantity less than one gallon, and in no quantity to be drank upon the premises, without first having obtained, in the manner provided by law, a license as a dram-shop keeper, except as hereinafter speci-This language certainly includes the medicated bitters sold by defendant, because they are admitted to contain alcohol. Neither do I think the defendant can claim any exemption in favor of his "bitters" from the language of the 3rd section of the act, which reads as follows: "Such dealer in drugs and medicines may sell or give away in any quantity, wines for sacramental purposes; liquors of any kind when the same are prescribed by a regularly registered physician, or are used solely in the admixture of necessary remedial compounds, the preparation of tinctures and the compounding of a written prescription, made and signed by some regular practicing physician, who shall have stated in such prescription that the liquor therein prescribed is a necessary ingredient: Provided, that such prescription shall in no case authorize such sale or gift more than one time."

The clause in this section which purports to authorize the druggist to sell any liquors which "are used solely in the admixture of necessary remedial compounds," was not, in our opinion, intended to authorize the sale of "medicated bitters containing alcohol." It refers to the use of liquors by a druggist in the admixture of necessary remedial compounds as they are required in the ordinary business of a druggist. When the admixture results in a compound falling under the popular designation of "bitters," and as such may be called for and used as an alcoholic beverage, it clearly falls within the prohibition of the act, although it may possess some intrinsic remedial qualities.

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But the use of liquor in such a compound cannot be regarded as used "solely in the admixture of necessary remedial compounds." The act does not absolutely prohibit the use and sale of such a compound. It only declares that when the admixtures of a druggist possess the ingredients and take the popular form and designation of alcoholic "bitters," he must sell them under the license of a dram-shop keeper and not under the license of a druggist.

A casual inspection of the elements of the compound in question cannot fail to reward the investigator with an amusing surprise, if nothing more. Considering that cinchona comes from Peru, columbo from Mozambique, gentian from the Alpine meadows of Europe, and quassia from tropical America or the West Indies, I am at a loss to find any herb or ingredient in the compound capable of giving to it its Rocky Mountain character, unless it be the alcohol. No one will pretend that the water called for in the receipt could effect such an extraordinary transformation of the ingredients used. As the conviction in this case took place before the passage of the act of March 26, 1881, it is not affected by the provisions of said act. See State v Roller, 77 Mo. 120.

Finding no error in the record the judgment is affirmed. All concur.

Hansbrough, Executor, et al., v. Fudge et al., Plaintiffs in Error.

Entry Nunc Pro Tunc: WHEN MADE. Unless there is something of record by which to amend, an entry nunc pro tunc cannot be made. But where the files of the court, the motion, the entry of its filing, its purpose and the entry of similar orders at the same term, in the same cause, show that the order was made, a nunc pro tunc entry may be made.

Hansbrough v. Fudge.

Appeal from Cass Circuit Court.—Hon. J. L. Morrison, Special Judge.

AFFIRMED.

Comingo & Slover with E. H. Fudge for plaintiffs in error.

Only such judgments and orders as are shown to have actually been made, can be supplied by nunc pro tunc entries. Pockman v. Meatt, 49 Mo. 348; Saxton v. Smith, 50 Mo. 490; Dunn v. Raily, 58 Mo. 136; Jones v. Hart, 60 Mo. 365; Wooldridge v. Quinn, 70 Mo. 371; Bilkin v. Rhodes, 76 Mo. 645. If the court failed to make the order at the April term, 1871, it could not be made as of that date on the 27th of December, 1877. Hyde v. Curling, 10 Mo. 360; Priest v. McMaster, 52 Mo. 62; State v. Jeffors, 64 Mo. 378. There is no relevant and competent testimony showing that the order was ever made.

C.W. Sloan with Boggess & Moore for defendants in error.

The nunc pro tunc entry was made upon competent and sufficient evidence. Gibson v. Chouteau, 45 Mo. 171; Lexington R. R. Co. v. Mockbee, 63 Mo. 348, and authorities cited by counsel for plaintiffs in error.

Sherwood, J.—The only question for determination in this cause, is the correctness of the ruling allowing the entry to be made nunc pro tunc of an order alleged to have been made, transferring the unfinished business in the above cause from the hands of Dale, former sheriff, into the hands of Briant, then sheriff, for completion. This cause was a partition proceeding; the unfinished business referred to being in part the collection of two promissory notes executed by Bills, who purchased the lands sold,

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having Fudge as his surety. Hays was the sheriff who conducted the sale in April, 1859. Hays went out of office in 1862, not having collected the notes, or having performed other business relating to the partition proceedings.

In April, 1869, Dale, then sheriff, was ordered by the court to take in charge and complete the unfinished business aforesaid. On the 18th day of April, 1871, the plaintiffs herein filed their motion to have a similar order of transfer made of such business from Dale to Briant, then sheriff.

The record shows the filing of this motion and its contents and purpose; but no entry was made of an order, as prayed in the motion.

The doctrine of this court unquestionably is that you cannot, without something of record to amend by, have an entry nunc pro tunc. This basis is furnished in the present instance. The files of the court, the motion, the entry of its filing, and its purpose, and the entries made by the court two days after the filing of the motion, and at the same term in the same cause, consisting of an order containing many recitals as already set forth, as well as a recital that on the 18th day of April, 1871, (the same day the motion aforesaid was filed), the court had made an order of record requiring and commanding that the unfinished business, etc., be transferred to A. C. Briant, present sheriff, etc., and the order also commanded Briant, as such sheriff, to make a deed, etc., to certain real estate. A similar order was, also, made on the same day, as the one just mentioned, and in the same cause, and containing a similar recital as to Briant and a command to execute a deed, etc.

For these reasons it must be held that an ample foundation was furnished for the entry, now for then, which the court ordered to be made; one in entire accord with our rulings heretofore. All concur.

HEATH V. GOSLIN et al., Appellants.

- Voluntary Association: CONTRACT: PERSONAL LIABILITY OF MEMBERS. The members of a voluntary association of individuals, organized for educational purposes, which contracts for the services of a teacher, are personally liable for her wages, in the absence of any agreement or understanding of the parties to the contrary.
- Practice: REPLY: FAILURE TO FILE. Where a cause has been tried
 on the theory that a reply has been filed putting in issue the new
 matter of the answer, the omission to file such reply cannot be taken
 advantage of on an appeal.

Appeal from Holt Circuit Court.—Hon. H. S. Kelley, Judge.

AFFIRMED.

The following were the declarations of law given at plaintiff's instance and referred to in the opinion:

1. If it appear to the court sitting as a jury, from the evidence, that on or about the 20th day of June, 1878, Asher Goslin, on behalf of himself as president of the Northwest Missouri Normal School and his co-defendants, T. C. Dungan, Wm. Hawkins, Wm. Kaucher, and Wm. A. Gardner, contracted with and employed Alice Heath, plaintiff, to teach a department in said Normal school during the next school year beginning on the first Monday in September, 1878, and to end June 12th, 1879, and agreed to pay her \$800.00 for her services, and she, the plaintiff; did then and there accept said offer and terms of said contract and did in accordance with the terms of said contract, enter upon the discharge of the duties as teacher of said department, in said school, on said day of September, 1878, and teach until the close of said school year, June 12th, 1879, and that at a meeting of defendants, as such Normal board, November 30, 1878, said board ordered Wm. Hawkins, secretary, to draw up a contract with Miss Alice Heath for her services as assistant teacher for said school year at \$800.00 for the year, and that they, the defendants,

ordered and directed Wm. Hawkins at divers times to issue warrants for her services, and such warrants were issued to the number of four, for \$200.00 each, and that defendant, T. C. Dungan, as treasurer for defendants, paid the sum of \$501.15, to her, all of such acts will be considered as affirming and ratifying said contract made by Asher Goslin, and the finding should be for the plaintiff in the sum of dollars, with interest from June 12, 1879, to the close of said school year, as the contract thereby becomes the contract of all and each defendant.

2. It is conceded that defendants were not a corporation, or a partnership, or a company, but that they were a committee or association organized for educational purposes, to carry on the Northwest Missouri Normal school and to devise ways and means to carry on said school and in that capacity to hire teachers and to provide for the payment thereof, and that they have no resources for raising money or means whereby to defray the expenses of said school; and if the court sitting as a jury, finds from the evidence that the defendants as such committee or association, contracted with or agreed to pay plaintiff the sum of \$800.00 for her services as teacher for the school year, beginning first Monday in September, 1878, and that she in good faith entered upon and performed said contract on her part, then the court should find the defendants liable for such part of said sum of \$800.00 as still remains unpaid and their liability is as individuals, not as a company, corporation, or board.

T. C. Dungan pro se, and T. H. Parrish for appellants.

The matter contained in defendants' answer, if true, was a complete defense, and plaintiff having failed to reply, it stood admitted, and the finding of the court should have been for defendants. R. S. 1879, §§ 3525, 3526, 3545; Phillips v. Jones, 20 Mo. 65; Emory v. Phillips, 22 Mo. 499, 501; Tomlinson v. Lynch 32 Mo. 160; Marshall v. Ins. Co., 43

Mo. 586 : Bartholow v. Campbell, 56 Mo. 117; Kansas City. etc., v. Sauer, 65 Mo. 278. This case does not fall within the rule announced in the cases of Smith v. City, etc., 45 Mo. 449; Henslee v. Canafax, 49 Mo. 295; Howell v. Reynolds Co., 51 Mo. 154; for the defendants raised their objections at every stage of the proceeding. The petition failed to state a cause of action. The authority of defendants to make the contract should have appeared from the petition. Field v. Railroad Co., 76 Mo. 614. The declarations of law for plaintiff were wrong. Childress v. Cutter, 16 Mo. 24; Hail v. Palmer, 5 Mo. 403; Morrissey v. Wiggins Ferry Co., 47 Mo. 521; Starkie's Ev., (8 Am. Ed.) § 298; 2 Greenleaf Ev., §§ 483, 484; Brown v. Pearson, 8 Mo. 159; Kuhn v. Weil, 73 Mo. 213; Story on Part., p. 128. If the plaintiff agreed to teach, knowing at the time from what source her pay was to come, and expected or agreed to look to that source, and did not expect to hold defendants individually, she cannot recover. Tutt v. Hobbs, 17 Mo. 486; Story on Part., § 130; Collyer on Part., 938; Taylor v. Zipp, 14 Mo. 482; Bolls v. Perry, 57 Mo. 449; Spurlock v. Sproule, 72 Mo. 503; Acton v. Dooley, 74 Mo. 63; Helmes v. Stewart, 26 Mo. 529; Munson v. Sylvester, 42 Ind. 106; Ewell's Evans Agency, side page 300.

James Lambird for respondent.

The finding and judgment of the court below is sustained by the pleading and evidence. The citizens of the town of Oregon could not be sued. There was no tangible principal behind defendants who could be reached and held liable, and, therefore, defendants were liable. 1 Parsons on Contracts, (6 Ed.) p. 124; Ib., p. 146; Story on Agency, (8 Ed.) §§ 275, 279, 282, 283, et seq; Hovey v. Pitcher, 13 Mo. 191; Thompson v. McCullough, 31 Mo. 224; McClellan v. Parker, 27 Mo. 162; Lapsley v. McKinstey, 38 Mo. 245; Einstein v. Holt, 52 Mo. 340; Blakely v. Benecke, 59 Mo. 193; Ferris v. Thaw, 72 Mo. 445.

Philip, C.—It appears from the pleadings and proofs that in 1874 the defendant, Goslin, who was connected with the public schools of the town of Oregon in Holt county, and the other defendants and citizens of said town. conceived the project of establishing, in connection with the public school system of the community, a high grade school after the fashion of a Normal school, to be known as the "Northwest Missouri Normal School." To that end a public meeting of the citizens was called, and measures were inaugurated to accomplish the purpose. Defendant, Goslin, as principal of the public school, was to have charge of the Normal department. As a means of raising the necessary funds for its conduct, the tuition was fixed at \$30. A public subscription was to be made of \$30 by each subscriber, to be held and used as a guaranty fund, subject to assessment to pay any deficit consequent upon a failure to realize from patronage a fund sufficient to defray the expenses of running the Normal department, added to which the school board of the public school furnished \$1,000 per year out of the public funds, and the use of the public building, fuel, etc.

The defendants were appointed a committee, known as "The Board of Regents," to take charge of the school and conduct its affairs.

The school was opened and conducted for the years 1877, 1878, and 1879. The plaintiff was employed by defendants, as such board, for the years 1877 and 1878 as a teacher, and paid by them. For the term to begin September, 1878, ending June, 1879, Goslin, as president of the board, applied to the plaintiff to renew the engagement with her as teacher for that term. They had paid her \$800 the year before. Goslin tried to get her to take less for the year in question. She declined, and thereupon he engaged her on the part of the board at the sum of \$800. She rendered the service accordingly. The board paid her \$400 in money for the first and second quarters, and for the

third and fourth quarters they gave her orders, signed by defendant, Goslin, as president, and the defendant, Hawkins, as secretary, on the treasurer for \$200 each, on which they made payments, leaving a balance of \$298.85, and interest, unpaid. To recover this sum this suit is brought.

The court sitting as a jury, found for the plaintiff, and rendered judgment accordingly. The defendants have ap-

pealed.

I. The contention of the defendants chiefly, is that the contract in question was not a personal undertaking on their part, but they were acting for the public, and the plaintiff rendered the service depending upon the fund that might come from the sources indicated in the feregoing statement.

The controlling question then is, to whom did the plaintiff give the credit, and whon did the defendant understand her to be crediting? If, as a matter of fact, it was so understood by both parties as to become a part of the contract that the so-called board of regents were not to be responsible in any event to this teacher for her agreed wages, they would not be bound, although there was no responsible principal behind them. Enough is shown by the record to conclude that the plaintiff, when she performed the service, knew the origin of this school, and the source from which the board expected its pecuniary sustenance. It is also true that she testified she did not expect the defendants individually to pay her. But she further testified, to what would seem to be the plain, common sense idea all the parties must have entertained, that she was employed by the board, and "expected the board—the defendants—would provide the means with which to pay me; I had nothing to do with the matter of raising the money; I did not agree to look to any particular fund or source for funds; the board hired me and agreed to pay me; I supposed they would raise the money in some way; I did not agree to take any pay, or rely on any contingent fund or anything of the sort; they employed me and agreed

to pay me, and I looked to them for pay and not to anybody else or any particular fund."

There were other facts in evidence too, which, in our opinion, entitled the plaintiff to have the issue submitted to the jury as to whether the defendants were personally answerable. Prior to this year in question the defendants had employed the plaintiff and paid her as a board. contract had for one year been reduced to writing, and it seems to have been the purpose and desire of both parties to reduce it to writing for this year. It was delayed and neglected. The secretary of the board drew up and signed the contract, but it was not completed by receiving the sig-

natures of all the parties.

One or two of these defendants make the point that they did not authorize the acting president of the board to make the contract, and one of them claims that, notwithstanding the minutes of the meeting kept by the secretary shows he was present, that in fact he was not present when the contract was drawn up and warrants issued to plaintiff on account of her salary. Pretermitting any discussion of the question raised as to whether this being a voluntary association, and not a body corporate, the minutes kept by the acting secretary are competent evidence against one not present and assenting thereto, there is ample in the case to submit to the jury from which the knowledge and cooperation of all the defendants might be justly inferred. They were the acting board, entrusted with the management of the school. They had been for years employing and paying this woman. They knew she was continuing to teach and being paid out of the funds. They had not withdrawn from their self-imposed office as a managing board.

This precise question was presented in Doubleday v. Muskett, 7 Bing. 110. The defendants there consented to become directors, and attended meetings as such, of a projected water company, for which an act of parliament was to be obtained for its incorporation. The defendants, after

attending one or more meetings, failed to appear further. It was held, although no act of parliament was had, and the project failed, they were responsible for works ordered at subsequent meetings of the projectors which they did not attend, having done no act to divest themselves of their character as parties concerned in the movement. whom did or could the plantiff in the case at bar look for pay but to the parties employing her? Who could she have sued but them? Back of them was no responsible principal. The people of the community, in whose interest the board now claim they were acting, were inaccessible. As was said by Sherwood, J., in Blakely v. Bennecke, 59 Mo. 195: "He was personally chargeable even on his own showing unless he had disclosed a responsible principal. But in this case there was no principal, either responsible or otherwise, to disclose. Company "I" was incapable of suing or being sued; it possessed none of the elements or attributes of a legal entity."

Indeed it cannot be affirmed that the intangible public authorized this board to employ the plaintiff. The mass meeting simply devised a plan by which they hoped the project would succeed. They promised nothing. The individuals who should subscribe to the fund merely bound themselves to the extent of their individual subscription, and no further. The board of regents accepted the tendered office of managers, und undertook to conduct its affairs, relying upon tuitions, subscriptions and the \$1,000 annuity from the public school fund to meet its expenditures. They, and not the plaintiff, are the parties to raise this fund. And if they discovered they could not succeed, it was their plain duty to have advised their employe of the fact, so that if she continued it would have been at the risk of procuring the funds for her payment from other source than the individual liability of the board. Had the people subscribed a certain sum to promote the project, to be paid annually, or otherwise, and the defendants had engaged the plaintiff with the understanding that they were the mere

agents of this public body to disburse the fund subscribed, she could not have held them personally bound. Tobey v. Claffin, 3 Sumner 379; Parrott v. Eyre, 10 Bing. 283; Story on Agency, 287. On the other hand, it is well settled that, although a party may be a mere agent, and known to be such, yet if he contracts in his own name, or in his name as agent when his principal is incapable of contracting, or is irresponsible, the law presumes he intended to bind himself. Story on Agency, §§ 281, 282.

The justice of this rule rests on the principle that otherwise the party performing the service would be remediless. If the agent, in such case, would stand exonerated, he must disclose a responsible principal. Lapsley v. McKinstry, 38 Mo. 245, and authorities therein cited.

In Horseley v. Bell, 1 Brown Ch. 101, it was held that, even where certain persons were appointed commissioners under an act of parliament for making a river navigable, with power to raise money on tolls for work being done, and the commissioners declined paying for this work upon the ground that no funds were left, the commissioners were personally bound upon the ground that the credit was given to them. So in Cullen v. Duke of Queensberry, 1 Brown Ch. 101, it was held that where the committee of a voluntary society entered as such into a contract with tradesmen for business to be done on behalf of the society, the funds proving insufficient, all the acting committee were personally answerable, on the ground that the credit must fairly be presumed to be given to them rather than to the subscribers at large.

The case of Tutt v. Hobbs, 17 Mo. 486, is not parallel. There the trustees were acting virtute officii, and contracted as such under the law of their creation. Back of them was a responsible principal. Their duties were prescribed by law, and Tutt knew that the fund to which he could alone look for pay was provided by law, and the trustees and commissioner were the mere agents of the law for its proper disbursement.

Briant v. Jackson.

II. It is insisted by appellants that the plaintiff, having failed to reply to the new matter set up in the answer, they were entitled to judgment on the pleadings. Even conceding that the answer entitled the defendants to a verdict on the matters pleaded, it is quite manifest that the case was tried all through as if the allegations of the answer were at issue. The demurrer to plaintiff's evidence did not raise this question, nor the motion for new trial. It a party would take advantage of such omission he should do so at the trial in a direct way. Otherwise there is nothing to distinguish this case from that of *Henslee v. Cannefax*, 49 Mo. 295, and many others since decided by this court, where it is held, that where the parties have gone through the evidence and trial precisely as if the reply was in, they cannot take advantage of such omission on appeal

III. The petition in this case was properly drawn. It followed the code in making a plain statement of the facts. The law arising on the facts as developed, shows a

personal liability that is sufficient.

The case being tried by the court, sitting as a jury, we discover nothing in the instructions indicating that the learned judge misconceived the issues or the law arising thereon.

It follows that that the judgment of the circuit court is affirmed. All concur.

BRIANT, Sheriff, etc., v. JACKSON, Administrator, Appellant.

Entry Nunc Pro Tunc: when MADE. The case of Hansbrough et al. v. Fudge et al., ante, p. 307, affirmed.

Appeal from Cass Circuit Court.—Hon. J. L. Morrison, Special Judge.

AFFIRMED.

Comingo & Slover with E. H. Fudge for appellant.

C. W. Sloan with Boggess & Moore for respondent.

Hough, C. J.—The plaintiff sues as sheriff, and his right to sue in that capacity depends upon the validity of a certain nunc pro tunc order of the circuit court of Cass county, transferring the unfinished business in a certain suit in partition from the hands of Douglass Dale, sheriff of Cass county, to the plaintiff as the successor in office of the said Dale. The validity of said nunc pro tunc entry having been affirmed by this court at the present term in the case of Hansbrough et al. v. Fudge et al., ante, p. 307, the right of the plaintiff to sue as sheriff is hereby established, and the judgment in this case, which was for the plaintiff; must be affirmed. All the judges concur.

STEADMAN, Appellant, v. HAYES et al.

- Fraudulent Conveyance: CREDITORS. In a suit to set aside a fraudulent conveyance, defendants cannot set up as a defense fraud upon creditors who are strangers to the record.
- Mortgage: TITLE. The mortgagee in a mortgage, executed to secure a bona fide indebtedness, is a purchaser in good faith, and acquires the legal title of the mortgageor.
- Fraud: EQUITY. In a proceeding to set aside a fraudulent conveyance, the controlling question is, whether there was fraud in the transaction which would warrant a court of equity in setting it aside.
- CASE ADJUDGED. The trial court having found there was no fraud in this transaction, the judgment upon a consideration of all the evidence is affirmed.

Appeal from Benton Circuit Court.—Hon. J. B. Gantt, Judge.

AFFIRMED.

M. A. Fyke and R. W. Campbell for appellant.

The court erred in dismissing complainant's bill. The evidence clearly shows the trade was fully consummated when Mitchell, the agent of Haves, delivered the deed to Stoddart. But, if the trade was conditional, and Mitchell exceeded his authority in delivering the deed, Hayes ratified the act. Haves received no consideration for the deed to his daughters, and if executed when claimed, it was voluntary as to subsequent purchasers without notice ants, who claimed the land, did not testify in the cause. This shows lack of good faith and taints their claim with fraud. Baldwin v. Whitcomb, 71 Mo. 651; Mabrey v. Mc-Clurg, 74 Mo. 575. Defendants are estopped from claiming under the deed to Hayes' daughters, although it was for a valuable consideration and executed prior to the Stoddart deed. "The true rule is, that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on the impression, he shall afterward be estopped from denying it." Sherrill v. Sherrill, 73 N. C. 8; Henderson v. Lemly, 79 N. C. 169; Raley v. Williams, 73 Mo. 310; Harrington v. Utterback, 57 Mo. 519; Brooks v. Kearns, 86 Ill. 547. The case is clearly within the jurisdiction of a court of equity. 2 Story's Eq., (4 Ed.) p. 12, § 700; Martin v. Rowe, 39 Ala. 722; Standish v. Dow, 21 Iowa 363; Dowing v. Wherrin, 19 N. H. 9; McGhee v. Wright, 16 Ill. 555; Almony v. Hicks, 3 Head. 39; Thompson v. Lynch, 29 Cal. 189. The fact that the conveyance, as between Stoddart and plaintiff is a mortgage, cannot affect plaintiff's rights.

James H. Lay and W. S. Shirk for respondents.

Plaintiff's petition shows that he has no grounds for relief in equity. Hayes' deed to Stoddart, in the hands of Mitchell, was only an escrow. Stoddart having obtained possession of it without complying with the conditions

upon which it was to be delivered, it was void in his hands, and even if plaintiff was a purchaser from him for a full consideration, and without notice, he would take no title. 3 Washburn on Real Prop., pp. 283, 287, 293, 294, 301, 303, and notes and cases cited; Townsend v. Hawkins, 45 Mo. 286; Stanley v. Valentine, 79 Ill. 548. The deeds from Stoddart to Williams, and from Williams to plaintiff, are at most only mortgages. O'Neil v. Capelle, 62 Mo. 202; Turner v. Kerr, 44 Mo. 429. Plaintiff's deed being a mere quitclaim, he is considered in law as buying with notice of all prior equities, whether he had actual knowledge of them or not. Ridgeway v. Holliday, 59 Mo. 444; Stivers v. Horne, 62 Mo. 473; Austin v. Sorney, 63 Mo. 19. A volunteer cannot successfully come into equity against another volunteer, and though Hayes' deed to his children was without consideration, parties claiming under him afterward without consideration, or with notice, cannot set it aside. 1 Story's Eq., § 433; Wallace v. Wilson, 30 Mo. 335; Bishop v. Schneider, 46 Mo. 472; Arbuchon v. Baider, 44 Mo. 560; Maupin v. Emmons, 47 Mo. 304. Plaintiff has never been in possession. This is an action to quiet title or remove a cloud from the title, and he must be in possession to maintain it. 1 Story's Eq., § 711 a; Bispham's Eq., § 575; Clark v. Ins. Co., 52 Mo. 272.

Henry, J.—By this action plaintiff seeks to set aside a conveyance of certain town lots in the town of Warsaw, and tracts of land in Barton county by William Hayes to his co-defendants, his daughters, dated January 31, 1876, and recorded the 17th day of May, 1876, alleging that on the 9th of May, 1876, said Hayes and wife, by their deed of that date and recorded May 20, 1876, conveyed the same property to Ashton B. Stoddart, who paid a valuable consideration therefor, without any notice of the conveyance to Hayes's daughters, which was without consideration, and contrived by them for the purpose of defrauding and cheating Stoddart out of said property. That although 21—80

said deed to his daughters purports to have been made and acknowledged on the 31st of January, 1876, it was not in fact made, or acknowledged, until long afterwards. Plaintiff claims the property in controversy by deed from one W. H. Williams, dated July 27th, 1876, to whom it was conveyed by Stoddart and wife the 13th of May, 1876.

The answer of defendants put in issue all the material allegations in the petition, and pleaded specially that, on or about the 9th day of May, 1876, William Hayes and Stoddart made a conditional agreement for exchange of hotel property owned by Stoddart at Osage Mission, Kansas, for the property of Hayes in controversy. That on the hotel property there was an incumbrance of \$1,500, and the condition of the exchange was that Stoddart should pay to Hayes money to pay it off, and that in order to enable Stoddart to obtain the money, Hayes and wife executed the deed above mentioned to Stoddart, and placed it in the hands of Edgar Mitchell, a son-in-law of Hayes, with the understanding and agreement between them that Mitchell should accompany Stoddart to Sedalia, and ascertain if a loan of \$1,500 could be effected by Stoddart on the land. That the deed was placed in Mitchell's hands that he might show it to parties of whom the loan might be solicited, but it was not to be delivered to Stoddart until the loan was obtained and the \$1,500 paid to Hayes. That the loan was not effected, nor the \$1,500 ever paid to Hayes, but that Stoddart, in violation of his said agreement, and by means unknown to defendants, fraudulently obtained possession of the deed and filed it for record with the recorder, etc., and that neither Hayes nor his co-defendants ever received any consideration for said conveyance, and that the deed was never delivered to Stoddart by Haves' authority. They also aver that when the agreement was made between Hayes and Stoddart, Jennie, Susan, and Clara Hayes, daughters and co-defendants, agreed with Hayes to convey to him or Stoddart, as they might determine, their title to the land, for a valuable consideration

to be paid to them. The court found for defendants and dismissed the bill, and from this judgment the plaintiff has appealed.

There was evidence introduced on the part of defendants tending to prove that the conveyance from Stoddart to Williams was made in fraud of his creditors, and that the deed from Williams to Steadman was made in furtherance of the same design, but this branch of the case may be disposed of very briefly. Creditors are not complaining of fraud in those conveyances and these defendants cannot set it up against Steadman. Nor does it matter that the deeds from Stoddart to Williams and from Williams to plaintiffs are only mortgages. If executed in order to secure a bona fide indebtedness, the mortgagee is a bona fide purchaser, and acquires the legal title of the mortgagor. The real and controlling questions are whether the deed was executed and delivered to Stoddart in consummation of the agreement to exchange property, and if so, was there fraud in the transaction between Hayes and his daughters which would warrant a court of equity in setting aside the conveyance to them. Reese, Melton, and John Wright, witnesses for defendants, testify to facts which seem to support the allegation in the answer, that the exchange was to be made only on condition that Stoddart obtained a loan of \$1,500 on the land, otherwise the deed was to be returned to Hayes. Hayes testifies positively that such was the agreement when the deed was delivered to Mitchell, and the court might very properly have so found from the testimony.

It appears, however, that subsequently Hayes accepted and placed upon record a mortgage executed by Stoddart and wife upon this property to secure him in the sum of \$1,500, the amount of the incumbrance upon the Kansas hotel property, and his explanation of that conduct is that Mitchell having failed to return the deed executed by him, he was apprehensive that he was about to be defrauded of his land, and filed the mortgage to try and protect himself,

He said: "I conceived in my mind a thorough swindle was being perpetrated on me, and I had to use all means in my power to defeat it, and put on record the deed to my children and mortgage to me from Stoddart." The mortgage bears date the 13th of May, 1876, and was recorded May 27, 1876, and Hayes' deed to Stoddart bears date the 9th of May, 1876, and was recorded the 20th of May, 1876. The deed from Hayes to his daughters was recorded May 17th, 1876, three days before Stoddart's deed from Hayes was recorded, and before Stoddart's deed to Hayes for the hotel property was recorded. That deed was delivered to Mitchell. Whether Hayes knew that it had been so delivered before recorded does not appear.

Stoddart therefore had constructive notice of that deed before the deed from Hayes to him was placed upon record. Hayes' testimony in connection with his own conduct, and the testimony of Melton, Reese, and Wright, which corroborates him, tends strongly to show that he was acting in good faith, and did the acts which seemed to throw suspicion upon his motives under the impression that they were necessary to his protection against an apprehended misuse of the deed he had executed to Stoddart.

He further testified that pending the negotiations between him and Stoddart for an exchange of property, he informed Stoddart of the deed he had made to his daughter. If that is true, Stoddart's inquiry of Lay as to Hayes's title must have had reference to its source, because he then knew of the conveyance to Hayes's daughters. Another circumstance which is urged as convincing proof that an exchange was actually made, is that Hayes's wife, two daughters and a son accompanied Stoddart and Mitchell to Osage Mission, and took possession of the hotel property and commenced business. This was before Stoddart executed to Hayes a deed for the hotel property, before he had Hayes' deed to him placed upon record, and when, according to the testimony of Hayes, Reese, Wright, and Melton, no exchange had been effected, but depended upon Stod-

dart's success in effecting a loan for \$1,500 on the Benton county property. Haves's family especially the females seem to have been exceedingly anxious to remove to Kansas, and over the old man's remonstrances, as he testified, went, pending the negotiations between him and Stoddard. Haves had a married daughter then living in Kansas, the wife of Mitchell, and, strangely enough, after Mitchell went with Stoddart to Sedalia to procure a loan upon the Benton county land, he drops out of sight and Stoddart, in violation of the express agreement between him, Haves, and Mitchell, is found in possession of the deed, which he has placed upon the record. It looks very like Mitchell and Stoddart had formed a plan for imposing not only upon Hayes, but the other members of the family, and it is by no means a forced inference, from all the facts, that the wife and daughters took possession of the hotel property on representations made by Mitchell and Stoddart that the trade had been concluded. The evidence also tends strongly to prove that the deed to his daughters was executed . and acknowledged by Hayes at the time the deed and acknowledgment bear date, and after a careful consideration of all the circumstances of the case we cannot say that the court erred in its finding, and the judgment is affirmed. All concur.

FARRIS et al. v. CASS AVENUE & FAIR GROUND RAILWAY COMPANY, Appellant.

- Negligence: CHILD: STREET RAILWAY. Whether the driver of a street car, who sees a child under two years of age playing in the street within six feet of the track, and keeps a fast trot until he is within seven feet of the child, is guilty of negligence, is a question for the jury.
- 2. Child: CONTRIBUTORY NEGLIGENCE OF PARENT. Where a child under two years of age escaped, almost from under the eye of the

mother, after she had taken all precautions reasonably possible for a person in her circumstances and state of life, onto a street railway and was killed by a passing car: *Held*, there could be no contributory negligence in the case.

3. Contributory Negligence: Acts of CHILD. A child under two years of age is, by its own acts, incapable of contributory negligence.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Leonard Wilcox for appellant.

The petition fails to state a cause of action. Harrison v. Railroad Co., 74 Mo. 369; Gantrel v. Egerton, 2 Com. P. (L. R.) 373; Railroad Co. v. Marcott, 41 Mich. 435; Howser v. Melcher, 40 Mich. 185; Berry v. Stinson, 23 Me. 140. The instruction to the effect that on the evidence plaintiffs could not recover, was erroneously refused. Citizens' R'y Co. v. Carey, 56 Ind. 403; Chicago, etc., R. R. Co. v. Bradfield, 63 Ill. 221; Peoria, etc., v. Champ, 75 Ill. 530; Purl v. Railroad Co., 72 Mo. 172; Shearman & Redfield on Neg., §. 49; Railroad Co. v. Smith, 46 Mich. 510; Callahan v. Warne, 40 Mo. 136; Hestonville Pass R. R. Co. v. Connell, 88 Pa. St. 533; Gavin a. Chicago, 97 Ill. 71; Unger v. Railway Co., 57 N. Y. 497; Railroad Co. v. Bradfield, 63 Ill. 222; Zimmerman v. Railroad Co., 71 Mo. 489; G. R., etc., R. R. Co. v. Huntley, 38 Mich. 540; Maher v. Railroad Co., 64 Mo. 275; Bell v. Railroad Co., 72 Mo. 61; Henze v. Railroad Co., 71 Mo. 638; Culhane v. Railroad Co., 60 N. Y. 138; McKeevey v. Railroad Co., 25 Ala. L. J. 335; Goshorn v. Smith, 92 Pa. St. 438; Holman v. Railroad Co., 62 Mo. 564; Harlan v. Railroad Co., 64 Mo. 483; Wallace v. Railroad Co., 74 Mo. 597. The court's instruction on contributory negligence was erroneous. Wright v. Railroad Co., 4 Allen 283; I. M. & I. R. R. Co. v. Brown, 49 Ind. 154; Boland v. Railroad Co., 36 Mo. 489; In re Hagan, 7 Cent. L. J. 313; Koons v. Railroad Co., 65 Mo. 592; Bellefontaine R. R. Co. v. Snyder, 24 Ohio St. 670; Karle v. Rail-

road Co., 55 Mo. 482. The court erred when instructing the jury upon the whole case, in not telling them what facts, if proved, would constitute negligence. Wyatt v. Railroad Co., 62 Mo. 411; Goodwin v. Railroad Co., 75 Mo. 73; Boland v. Railroad Co., 36 Mo. 519; Tarwater v. Railroad Co., 42 Mo. 196; Railroad Co. v. Armstrong, 52 Pa. St. 285; Masheck v. Railroad Co., 71 Mo. 276.

Broadhead, Slayback & Haeussler and E. J. O'Brien for respondent.

It is well settled that managers of street cars owe it as a duty to the public to observe due caution in traveling the streets of a city. Huelsenkamp v. Citizens' R. R. Co., 37 Mo. 553; 62 Mo. 408; Wyatt v. Citizens' R. R. Co., 55 Mo. 485. The child was too young to be guilty of contributory negligence. Miller v. Tunnel Co., 7 Cent. L. J. 312, 313; Fricke v. Railroad Co., 75 Mo. 543, 595; O'Flaherty v. Union R. R. Co., 45 Mo. 70; Isabel v. Railroad Co., 60 Mo. 475; Peterson v. Stuart, 8 Cent. L. J. 76. The parents of the child were not guilty of negligence. The question of negligence was one for the jury. Brown v. Railroad Co., 50 Mo. 466; Dale v. Railroad Co., 63 Mo. 455, 460; Buesching v. Gaslight Co., 73 Mo 219.

RAY, J.—This suit was commenced and tried in the circuit court of the city of St. Louis, where the plaintiff had a verdict and judgment, from which the defendant appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, from which the defendant has appealed to this court.

The opinion of the court of appeals, affirming said judgment, is contained in the record, and is as follows:

"This is an action for damages for killing the child of plaintiffs. There was a verdict and judgment for plaintiffs. There was evidence tending to show that at the date of the occurrence a car of defendant's line was being driven west,

on Cass avenue, near Seventeenth street, on a slightly down grade, on the afternoon of a summer day. The neighborhood is a populous one, inhabited by persons of the poorer class, and children are often playing there in the street. The car was going at the rate of six to seven miles an hour, at a fast trot. The rate of speed was unusual in the locality, and such as to attract the attention of witnesses from the unusual noise made by the car. The child of plaintiffs was standing in the street, about six feet from the car-track, and half way between the track and curb, and was first observed by the driver when he was about half way a square, or 150 feet off. The driver did not slacken speed. When the horses got within about seven feet of the child, it ran toward the track and was trampled upon by the horses. The driver did all in his power to stop the car when the child moved toward the track. But it was then too late. The child was under two years old at the date of the accident. It had escaped from the enclosure of the parents, without any fault on their part. It died next day from the injuries received. An instruction in the nature of a demurrer to the evidence was properly refused. What is ordinary care and what is negligence, are inquiries to be answered, in most cases, by the jury. Kennedy v. N. Mo. R. R. Co., 36 Mo. 351. It cannot be declared as a matter of law, that it is not negligence in the driver of a street car, who sees a child under two years old playing in the street, within six feet of the track, to keep a fast trot until within seven feet of the child, on the theory that the child, perhaps, will not be frightened and confused by the noise of a street car approaching at the rate of six or seven miles an hour. There was no question of contributory negligence in the case. The evidence is clear and uncontradicted that the child escaped, almost from under the eye of his mother, after she had taken all precautions reasonably possible for a person in her circumstances and state of life.

The cause was submitted to the jury on the following

instructions, the first of which was given by the court of its own motion, the second was given at the instance of defendant.

'If you believe from the evidence produced before you, that on or about the 21st day of June, 1877, the defendant corporation was operating a street railroad, running for part of its course along Cass avenue, in the city of St. Louis, and, at the time aforesaid, the driver in charge of one of defendant's cars, and then in the employ of the defendant as such driver, was negligently and carelessly driving the team attached to said car, along said street, and that by reason of said negligence and careless driving, and as a direct consequence thereof, such team, or car, run upon and injured Edward Farris, the infant son of plaintiffs, and that he, the said Edward, died, as the result of such injury, then the plaintiffs are entitled to a verdict at your hands; provided you further find from the evidence that the plaintiffs did not negligently contribute to such injury by knowingly allowing, or negligently permitting, their child to go unattended upon the public street, where defendant's cars were constantly running; and you are instructed that if the plaintiffs did so knowingly or negligently allow their child to stray upon said street where and at the time he received said injury, such fact shows culpable carelessness on their part, and constitutes such contributory negligence as will prevent a recovery by them in this action, unless, notwithstanding such negligence on their part, the defendant's driver might have prevented the injury to the child by the exercise of ordinary care and watchfulness.

'In determining whether the driver of defendant negligently and carelessly drove his car, or whether the injury to the child was occasioned by his negligent and careless driving, you are to consider all the attending facts and circumstances, but you are in no wise at liberty to presume negligence or carelessness on his part from the mere happening of the accident. These are facts which require

affirmative proof, and the burden of showing them, as well as the want of contributory negligence on the part of

plaintiffs, rests with the plaintiffs.

'And in determining whether the plaintiffs contributed, by their negligent custody and care of their child, to its injury and death, you are to consider whether or not they exercised that degree of caution, care, and watchfulness over their child in keeping him off the street, and out of danger, which was reasonable and proper for parents in their circumstances of life. If the child at the time of the injury complained of had not arrived at two years of age, you are not to consider his acts in determining whether or not there was contributory negligence on the plaintiffs' part, as no negligence can be attributed to so young a child. If you believe any witness has sworn falsely to any material fact in this case you are at liberty to disregard all his evidence. If, under these instructions, you find the issues for the plaintiffs, you will assess their damages in the sum of \$5,000. The court instructs the jury that the defendant is not to be held liable in this case simply because the plaintiffs' child was injured by their horses or car, while the same was being driven along a public street in the city. but that defendant's liability depends on the question whether or not its driver was guilty of a want of ordinary care in the management of said horses and car at the time of the accident; and if the jury believe, after considering all the evidence in this case, that defendant's driver was exercising as much care, and giving as close attention to his business at the time of the accident as could be reasonably expected from a man of ordinary sense and judgment, and of ordinary skill as a driver in the same situation, then the jury will find for defendant.'

"The instructions seem to have presented the law of the case to the jury in a manner of which appellant has no reason to complain. What is said in the instructions as to contributory negligence could in no wise prejudice the appellant. There could be no contributory negligence on

the part of so young a child, even it be conceded that the presence of so young a child unattended on a public street, was prima facie evidence of neglect on the part of his parents if unexplained. The explanation was complete and there was no controversy about it.

"The father was a laboring man, and the mother could afford no servant. The gate of the yard was kept fastened with a latch beyond the child's reach. The mother was working and the child playing, in the next room, with the door open between them. As soon as the mother ceased to hear the child in the next room she went out after it. But some children had unlatched the gate and she met her husband bringing the child home after the accident.

"Thirteen instructions asked for defendant were refused. Most of these were directed to the question of contributory negligence, and were in manifest contradiction with the law of this State, as repeatedly declared by the supreme court and by this court, (Mascheck v. St. L. R. R. Co., 3 Mo. App. 600; O'Flaherty v. Union Railway Co., 45 Mo. 70), or were not supported by any evidence in the case. An instruction to the effect that the driver was bound in discharge of a duty to the traveling public, not to slacken speed, except in cases of necessity, and that no such necessity arose in this case until the child attempted to cross the track, was properly refused. The judgment is affirmed. Judge Hayden concurs; Judge Lewis is absent.

A. Bakewell."

We have carefully examined this opinion, the authorities cited, the pleadings and evidence in the cause, and believe it to be a correct and satisfactory disposition of the case and the questions involved. We have also considered the briefs and arguments of counsel in this court, but find therein no cause to change that opinion. Substantially the same views are expressed by this court in recent cases, very much like this. Frick v. St. L., K. C. & N. R'y. Co., 75 Mo. 542.

Donnell v. Byern.

There being no error in the record, the judgment of the St. Louis court of appeals affirming that of the circuit court is therefore affirmed. All concur.

DONNELL et al. v. Byern et al., Appellants.

- Evidence: ATTACHMENT WRIT: DEFECTS IN. In a suit by attaching creditors to set aside a fraudulent mortgage, the writ of attachment sued out pendente lite in term time without order of court, and although not made returnable to any court, term or day, is admissible in evidence to show that plaintiffs were attaching creditors in the attachment suit; the latter suit having been commenced with personal service with which defendants were served.
- 2. Lost Deposition: CERTIFIED COPY FROM SUPREME COURT. On the re-trial of a cause which had been reversed and remanded by the Supreme Court, a certified copy of a deposition made from the transcript of the record in the latter court, was properly admitted in evidence, it being shown that the original was lost, and also that it had been correctly copied and forwarded to the Supreme Court in the transcript, to which it belonged.

Appeal from Moniteau Circuit Court.—Hon. E. L. Edwards, Judge

AFFIRMED.

Moore & Williams for appellant.

The court erred in admitting in evidence the pretended attachment writ. R. S., § 448; Holliday v. Cooper, 3 Mo. 286; Bobb v. Graham, 4 Mo. 222; Hardin v. Lee, 51 Mo. 241; Dunham v. Heaton, 28 Ill. 264; Drake on Attach., (3 Ed.) § 184; 1 Tidd's Prac., 161; Bouvier Law Dic., title "Writ." The court also committed error in permitting the certified copy of the deposition of H. E. Byern to be read to the jury. 1 Greenleaf Ev., §§ 163 to 166; Bergau v. People, 17 Ill. 426; Wilbur v. Seldon, 6 Conn. 162; Powell

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v. Waters, 17 Johns. 176; People v. Newman, 5 Hill 295; Morris v. Hammerle, 40 Mo. 489; Jaccard v. Anderson, 37 Mo. 91; Finney v. St Charles College, 13 Mo. 265.

Draffen & Williams for respondent.

The writ of attachment was admissible in evidence. 1 Wag. Stat., p. 184, §§ 13, 16. The certified copy from the Supreme Court of the deposition of H. E. Byern was also rightly admitted in evidence. Finney v. St. Charles College, 13 Mo. 266; Brunn v. Wood, 19 Mo. 475. Weeks on Depositions, § 462.

I.

Sherwood, J.—This cause has been here on a former occasion, and is reported in 69 Mo. 464. The error for which the judgment was then reversed has been cured by giving the sixth instruction asked by the defendants. The controlling question in this case, of course, is whether the mortgage was fraudulent as to the furniture and fixtures. On this point the evidence was the same as before, and the question of fraud or no fraud has been passed upon by two juries and two circuit judges, and the same result reached in each instance. The questions arising on the last trial were presented to the jury in a very satisfactory manner by the instructions on the part of all the parties litigant. And the evidence as to fraud under our repeated rulings, warranted the court in adopting as it did the finding of the jury. Hopkins v. Sievert, 58 Mo. 201; Burgert v. Borchert, 59 Mo. 80; Massey v. Young, 73 Mo. 260. We pass now to the discussion of two points on which the defendants lay great stress for a reversal, and will discuss them briefly in the following paragraphs:

II.

The transcript from the Tipton common pleas court did establish that plaintiffs, Donnell and Tilden, were attaching creditors. Their suit was commenced by sumDonnell v. Byern.

mons, and the defendants in that suit, Byern and Moller, were personally served with process. Afterwards and on the first day of the term at which the summons was made returnable, the writ of attachment was sued out. The only points of irregularity which can be urged against the issuance of this writ is that it was issued in term time, and without the order of the court, and that it is made returnable to "no court, to no day, and to no term."

The statute provides that where the action is begun in the ordinary way, that "the plaintiff" * * may at any time pending the suit, and before final judgment, sue out an attachment in such action, on filing an affidavit and bond, as required in cases of original attachment." R. S. 1879, § 410. And the statute further provides in such cases that where the defendants have been previously summoned, the clause of summons shall be omitted. Ib., § 418. Such being the statute law, and the defendants having been brought into court on process regularly issued in the ordinary way, we need not, perhaps, discuss the point whether a writ returnable to a dies non is void or not.

This court, in repeated instances, has held that "proceedings which are amendable are not void." Hardin v. Lee, 51 Mo. 241. And the liberal scope of amendments in such proceedings authorized by statute was recognized in this state many years ago. Henderson v. Drace, 30 Mo. And obviously enough the status of a cause where a defendant is already in court by service properly had, must differ widely from one where proper process has not been issued. The only object of the attachment pendente lite was to seize on a certain res and hold it in the grasp of the court to await the recovery of judgment in a suit then pending. Where this is the case, where a defendant is personally served with process or voluntarily appears to the action, the proceedings, however defective the affidavit, or writ, will be valid, and the rights acquired thereby will not depend upon the attachment for their validity, but upon the judgment, which will bind not only the attached propHixson v. The St. Louis, Hannibal & Keokuk Railroad Company.

erty but other property of defendant. 1 Wag. Stat., pp. 188, 189, §§ 36, 40. In this case the defendants made no question of the right of the court to exercise jurisdiction over them by attachment, and after judgment rendered in that action, it is quite too late for them, or any one for them, to question, in a collateral proceeding, the rights acquired under that judgment. Drake on Attachment, § 87; Toland v. Sprague, 12 Pet. 300; Inman v. Allport, 65 Ill. 540.

III.

The copy of the copy of Byern's deposition was properly admitted in evidence. The loss of the original deposition was shown. It was also shown that the original deposition had been correctly copied and forwarded to this court in the transcript to which it belonged, and the certificate of the clerk of this court that the copy used in evidence was a true copy of the copy of the deposition which had been forwarded him, was sufficient to identify the deposition and make the copy certified competent evidence; it was certainly the best evidence which was then available. Besides, the deposition by being copied into the transcript, filed in this court, became a record of this court, and was therefore capable of being proved like any other record. One of the methods of proof is a copy made by an authorized officer. 1 Greenleaf Ev., §§ 501, 503.

Therefore judgment affirmed. All concur.

HIXSON, Appellant, v. The St. Louis, Hannibal & Keokuk Railroad Company.

Railroads: DUTY OF TRAVELER APPROACHING: CONTRIBUTORY NEGLI-GENCE. One who approaches a railroad crossing at a locality familiar to him, where the track cannot be seen, and where the noise of an approaching train, if close, would drown the noise of his buggy, and who does not stop to listen for the train, nor look for it until Hixson v. The St. Louis, Hannibal & Keokuk Railroad Company

upon the side-track eight and a half feet from the track, although warned in a manner to attract his attention, is guilty of such contributory negligence as will preclude a recovery for an injury sustained from the passing train while attempting to cross.

Appeal from Hannibal Court of Common Pleas.—Hon. Theo. Brace, Judge.

AFFIRMED.

R. E. Anderson and T. H. Bacon for appellant.

The court, after hearing all of the testimony on both sides, had no right to direct a verdict for defendant. Woods v. Atlantic, 50 Mo. 112; Kelly v. Hannibal, 70 Mo. 604 trial court only has the right to set aside the verdict and grant a new trial, and has no right to dictate the verdict of the jury in advance. Lockwood v. Atlantic, 47 Mo. 50. The case is distinguishable from that of Henze v. Railroad Co., 71 Mo. 636. Appellant did not fail to listen. If he had, unless it conclusively appears there was something audible, he was entitled to a jury. Baxter v. Troy, etc., 41 N. Y. 502; Am. and Eng. R. R. Cases, vol. 6, p. 191; Strong v. Placerville, 8 Am. and Eng. R. R. Cases 273; Smedis v. Brooklyn, 88 N. Y. 13; 88 N. Y. 445. Any laxness on appellant's part in approaching the crossing should be attributed to the absence of bell-ringing, and defendant cannot take advantage of any such negligence, superinduced by its own negligence. Tabor v. Missouri, etc., 46 Mo. 353; Morrissey v. Wiggins, 47 Mo. 525; Johnson v. Hudson, 20 N. Y. 66; Jetter v. New York, etc., 41 N. Y. 162; Penn. v. Ogier, 35 Pa. St. 60. Defendant and its licensor were jointly liable for the obstructed view and passage caused by box cars on the side-track. Clement v. Canfield, 28 Vt. 302; Ohio v. Dunbar, 20 Ill. 623; 1 Redfield R'y, (1 Ed.) p. 590, § 142, note 8. The licensor had no right to obstruct Third street crossing with a side-track. Lackland v. North Missouri, etc., 31 Mo. 181. The ordinance being in evidence showed that the speed, if over six miles an hour, was exHixson v. The St. Louis, Hannibal & Kcokuk Railroad Company

cessive. Fanning v. Voelker, 40 Mo. 129. Appellant's most prudent course was to cross as soon as possible. Mackay v. New York, 35 N. Y. 75.

Easley & Russell and W. P. Harrison for respondent.

Plaintiff's acts were so negligent and incautious as to bar his recovery. Henze v. Railroad Co., 71 Mo. 636; Turner v. Railroad Co., 74 Mo. 602; Railroad Co. v. Beal, 73 Pa. St. 503; Benton v. Railroad Co., 42 Iowa 193; Railroad Co. v. Miller, 25 Mich. 274. The violation of the ordinance would not make a case against the defendant, without the further fact being shown that such violation caused the injury. Karle v. Railroad Co., 55 Mo. 476. Plaintiff cannot hold defendant accountable for the result of his own impatience and carelessness. Btacker's Ex. v. Receivers, etc., 18 Am. Law Reg. 562.

Norton, J.—This suit was brought to recover damages alleged to have been sustained by plaintiff, in consequence of the negligence of defendant in running its locomotive at Third street crossing, in the city of Hannibal, over and against a buggy in which plaintiff was riding, throwing him therefrom, and inflicting upon him serious personal injuries. It is alleged that defendant was running its train at the speed of fifteen miles an hour, without ringing its bell or sounding an alarm.

Defendant's answer, besides containing a denial of the above averments, sets up that the injuries to plaintiff were occasioned by his own carelessness and negligence.

At the close of all the evidence the court instructed the jury that plaintiff was not entitled to recover, whereupon plaintiff took a non-suit and judgment was rendered for defendant, from which plaintiff has appealed, and the only question which the appeal presents is as to the propriety of the action of the trial court in sustaining a demurrer to the evidence. Hixson v. The St. Louis, Hannibal & Keokuk Railway Company.

It appears from the evidence that the track of the railroad which defendant was operating crossed Third street, in the city of Hannibal; that plaintiff on the day of the accident was riding in a buggy drawn by one horse on said Third street, and was traveling south toward said crossing; that on each side of said street on the north of said crossing for a distance of one block, there were piles of lumber of sufficient height which, with cars standing on a switch or side-track, shut off any view of defendant's track; that because of the lumber and the cars on the sidetrack a person approaching said crossing from the north could not see the track of defendant's road to the west until after the south rail of the side-track was passed; that the south rail of the side-track was about eight or eight and one half feet from the north rail of the main track on which the engine was running; that a person after getting one or two feet south of the south rail of the side-track could see the main track in the direction defendant's train was coming for about seven hundred feet.

Plaintiff, who was examined in his own behalf, testified as follows:

"That from the Hannibal & St. Joseph railroad, on Collier street, to defendant's railway, the piles of lumber on the west side of Third street occupied a third or fourth of the width of the street. The approach on Third street to defendant's track was barely wide enough for two teams to pass each other. That on June 11th, 1880, he and Mr. Lewis Ross were in a buggy, drawn by one horse, going south on Third street, and on reaching the Hannibal & St. Joseph railroad crossing, the defendant's railroad being a block further south, they stopped; they then crossed the Hannibal & St. Joseph railroad and drove on towards the defendant's track. Witness was on the right side of the buggy; was driving with the reins in one hand and the whip in the other. When about fifty yards from the defendant's track witness checked his horse; did not stop him perfectly still as before, but came down to a

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slow walk and inquired of Ross if he heard anything. Thinks he was on a graveled road, and a buggy makes more noise on that kind of road. Guessed there was nothing in the motion of the buggy to prevent his hearing the approach of a train. Did not hear any bell; did not hear anything; could not hear any sound of a moving train. To inform himself whether there was a train coming or not witness did as people generally do, check up or stop. By checking up witness meant going in a walk or standing still. In approaching the crossing they traveled slowly, not out of a walk, till they got on the track. Did not see the train until after coming out from the car. Could not see the train till they got around the box-car; was looking both ways far as he could. The left side of the buggy was loose and made some noise. Tried to hit the horse but the engine hit first. The engine hit the hind wheel of the buggy and threw him to the south side of the track, the buggy partly on him. The engine mashed his left arm so that it had to be taken off. His left lung was partly paralyzed and his back was affected, causing great pain. The locomotive was pretty close to him when he first saw it; its speed about twelve to fifteen miles per hour. When north of the Hannibal & St. Joseph railroad he began to listen for the sound of a train on that road. When somewhere between the two roads began to listen for a train on defendant's road. Could not see anything on either side of the street. Lived here since 1855 off and on. Had very seldom used that crossing in the last five years. Had gone over it a good many times the last year. His business carried him in that direction but not regularly. Had not crossed before for about two weeks. The time of the accident was between ten and eleven o'clock. Had crossed the side track when he started his horse over main track. Commenced looking for a locomotive when he got on the side track. Could not have seen a train for the box-car. The distance visible on the main track depended on how far the box-car was east and how close you were to it.

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When he made the attempt to strike his horse with the whip the front wheels of the buggy were on the track he guessed. When I first saw the train the horse probably had his front feet across the main track on the south side; not certain. His feet were off. The front wheels were on the track. This would not have brought witness between the tracks. Had to pass the box-car to see the train. A train that is very close would make more noise than a brown and the second of the sec

buggy, enough to overcome it."

Witness Jackson, on part of defendant, who was engaged in loading lumber on a wagon on Third street near the crossing, testified that he hallooed to plaintiff and said, "look out, there is a train coming;" and witness Yates who was assisting Jackson in loading the lumber said, "hold up there—there is a train coming right there." Both these witnesses testified that they spoke in a tone of voice loud enough for plaintiff to hear it; that they did not know whether he heard them or not; that he turned and looked over his shoulder; did not stop but drove on. Alvin White, who was near three hundred feet away, testified that he heard Jackson and Yates halloo to plaintiff. Jackson and Yates testified that when they cried out plaintiff was about twenty-five feet from them. There was discrepency in the evidence as to the rate of speed at which the train was run, some of the witnesses put it at five and others at fifteen miles per hour. There was also discrepancy as to whether the bell was rung or whistle sounded. The locomotive was attached to a train of eight loaded freight cars and the way car.

According to plaintiff's own version of the accident under the doctrine laid down in the cases of *Henze v. Rail-road Co.*, 71 Mo. 636 and *Turner v. Railroad Co.*, 74 Mo. 602, he was guilty of such contributory negligence and disregard of the surroundings as not to entitle him to recovery. He had known the locality for about twenty-five years, was familiar with the surroundings, and notwithstanding he was travelling on a graveled road in a buggy,

the left side of which was loose, and made a noise, and notwithstanding the fact that the sides of the street were so obstructed with piles of lumber that he could not see defendant's track, and notwithstanding the fact to which he testified that the train if close would make noise enough to overcome the noise of a buggy, and that the train consisting of a locomotive and eight freight cars loaded, was near or close before plaintiff reached the switch, as the sequel fully proved, yet he did not stop to listen for the train nor commence looking for a train till he got on the side track. According to his own evidence the train, if near, would have made sufficient noise to overcome that of the buggy, and if so he must necessarily have heard it, and to undertake to cross under such circumstances, to say nothing of the warning given him by Jackson and Yates that "a train was right there," "to hold up," in tone of voice loud enough to be heard a block or three hundred feet distant, and which caused plaintiff to turn and look over his shoulder, amounted to reckless carelessness.

This case is distinguishable from the case of Johnson v. Railroad Co., 77 Mo. 546, in this, that in that case the plaintiff stopped at a point where he could see the track of the road for a considerable distance, looked and listened for a train and neither seeing nor hearing one proceeded on his way.

Judgment affirmed. All concurng.

Alexander et al., Appellants, v. Lydick.

- Married Woman: HER PERSONAL CHATTELS. Prior to the act of 1875, (R. S., § 3296,) personal chattels of the wife vested absolutely in the husband, and became subject to his debts.
- statutory construction: Revised statutes, section 3296.
 A sewing machine purchased by the wife in 1876, in part with the proceeds of a colt belonging to her husband, and in part with the

products of her farm, held not to have been acquired "with her separate money or means," so as to give her an independent title thereto, within the provision of the acts of 1875. R. S., § 3296.

- 3. Revised Statutes, Section 3296: NECESSARIES FOR FAMILY. Medical services rendered the family are within the provisions of R. S., section 3295, subjecting her property to attachment and execution for debts and liabilities created by the husband for necessaries for the wife and family.
- 4. Husband and Wife: GIFT BY HUSBAND: INSUFFICIENT EVIDENCE OF. On an examination of the evidence, Held, that it failed to show a complete and perfected gift to the wife, by the husband, of certain property, as claimed by her.
- 5. Married Woman: General judgment against: Her contracts and torts: Liability for. A married woman is not liable on her contracts made during coverture, and no personal judgment can be rendered against her on account of them. She, however, is liable conjointly with her husband for torts committed during coverture, and a general judgment against her and her husband can be rendered therefor; but this liability relates only to such torts as she may have committed out of his presence, and without his order or consent; otherwise he is liable alone for them, and she is exempt, upon the presumption of being induced to commit them under his coercion.
- 6. ——: REPLEVIN BOND: GENERAL JUDGMENT: SURETIES. While a general judgment cannot be rendered against a married woman on a replevin bond, yet it can be rendered against her co-principal and sureties, who are legally liable thereon.

Appeal from Livingston Circuit Court.—Hon. E. J. Broaddus, Judge.

REVERSED.

R. R. Kitt for appellants.

The evidence shows conclusively that the property in dispute was that of plaintiff, Elizabeth Alexander, when the constable seized it. Admitting that the property became the husband's by right of marriage, yet he has the right, when not in fraud of creditors, to make a gift of any personal property to the wife. *Richardson v. Lowry*, 67 Mo. 417. The judgment being a general one against a married

woman, is a nullity. Gage v. Gates, 62 Mo. 412; Lincoln v. Rowe, 64 Mo. 138; Caldwell v. Stephens, 57 Mo. 352; Long v. Cockrell, 55 Mo. 93. The judgment being void as to one, is void as to all, and if reversed as to one, it should be reversed as to all. Cov. Mut. Ins. Co. v. Clover, 36 Mo. 392; Dickerson v. Crisman, 28 Mo. 135; St. Joseph Ins. Co. v. Hauck, 71 Mo. 465.

O. J. Chapman and L. A. Chapman for respondent.

Prior to the act of the legislature of 1875, the wife's personal property vested eo instanti in the husband, and the rule was the same as to all such property which she acquired or became beneficially possessed of after the marriage. Kelley on Cont. of Married Women, 27; Sallee v. Arnold, 32 Mo. 532; Walker v. Walker, 25 Mo. 367; Woodford v. Stephens, 51 Mo. 443; Clark v. Bank, 47 Mo. 17; Boyce v. Cayce, 17 Mo. 47; Hunt v. Thompson, 6 Mo. 148. The wheat was liable in the attachment suit because based on a claim for necessaries-medical services being necessaries. R. S., § 3295; Bevier v. Galloway, 71 Ill. 517; Cochran v. Lee, 24 Ala. 380; Grace v. Hall, 2 Humph. (Tenn.) 29. The coverture of Elizabeth Alexander could not operate to discharge the sureties on the appeal bond. Weed, etc., v. Maxwell, 63 Mo. 486; Foxworth v. Bullock, 44 Miss. 457; Stilwell v. Bertrand, 22 Ark. 375.

Martin, C.—This was an action for the claim and delivery of personal property, consisting of some wheat, household furniture, wagon, sewing machine, books, bookcase, etc., and was brought before a justice of the peace by whom judgment was rendered for plaintiff. On an appeal to the circuit court, judgment was given for the defendant against the plaintiffs and their sureties, for return of the property or payment of the value thereof, which was assessed at \$70.

In the amended statement it is alleged that the plaint-

iffs are husband and wife, but that the property sued for belongs to the wife. It appears from the evidence that the property was levied upon by the defendant, as constable, in obedience to the command of an attachment against Simeon Alexander, the husband, by his creditors. As ground for their attachment, they alleged that defendant was about to move out of the state for the purposes of changing his domicile. These attachment suits were sustained upon trial before the justice.

In the trial of this case the testimony consisted almost entirely of the statements of Mrs. Alexander. married in 1874 to Simeon Alexander, her present husband. At that time she was the widow of John V. Curl, deceased, who died in 1872. After his death a part of his land was set apart by the probate court as the homestead of his widow, where she was residing at the time of her second marriage. All the property claimed in the suit, except the wheat, wagon and sewing machine, she acquired from her former husband's estate. The wagon she purchased with her own money in 1872. The sewing machine she bought in 1876 with wood and apples from the homestead and proceeds of the sale of a colt foaled by a mare she had acquired from her first husband's estate. The wheat was the product of the said homestead in 1879. It appears that in September, 1878, the wife and husband separated, the husband intending to leave her. She testified that he then gave to her all his interest in the personal property possessed by her before marriage with him or purchased since with her own money, and that this included all the property excepting the wheat. About two months after he left her he changed his mind and returned again, and they were residing together on the same homestead where all the property was found at the time of the attachment. Simeon Alexander never owned any property of his own, but was insolvent at the date of his marriage and continued so until the time of the trial. The debt on which the attachment was sued out and upon which judgment was

rendered consisted of an obligation of Simeon Alexander incurred in favor of Dr. Bottom, plaintiff in the attachment, for medical attendance and services rendered by him in behalf of George Curl, son of Mrs. Alexander, by her first husband, and who at the time of his sickness was a member of the family and residing with Mr. and Mrs. Alexander. The obligation was incurred in 1875.

I do not think the plaintiff was entitled to recover on this evidence. As to the property acquired by her from her former husband's estate prior to her second marriage, it consisted of chattels in possession. This property prior to the act of 1875 vested absolutely in the husband and became subject to his debts. Sallee v. Arnold, 32 Mo. 532; Woodford v. Stephens, 51 Mo. 443. There is no evidence in the case tending to prove that she ever had or was recognized by her husband as having a separate estate in this property. McCoy v. Hyatt, ante p. 130. The wagon which she purchased in 1872 would go to her husband upon her marriage along with the property acquired from her first husband's estate. She could not lawfully claim the sewing machine purchased in 1876. The evidence shows that it was purchased in part with the proceeds of a colt belonging to her husband and in part with wood and apples coming from the farm. After, as well as before, the act of 1875, the husband was entitled to enjoy the rents, issues and products of his wife's lands. The General Statutes of 1865 exempted them from execution for most of his debts and prohibited him from alienating them without joining with her in a deed. R. S. 1879, § 3,295. This machine, although acquired after the act of 1875, was clearly not acquired "with her separate money or means," so as to give her an independent title within the provisions of said act. R. S. 1879, § 3,296. The wheat being the product of the land, and vesting in him subject to the General Statutes of 1865, could not lawfully be claimed by her as against the process and debt in this case. The General Statutes of 1865 expressly subject such issues and products to attach-

ment and execution for necessaries for the family. R. S. 1879, § 3,295. Medical attendance seems to fall within the designation of necessaries. Bevier v. Galloway, 71 Ill. 517: Cothran v. Lee, 24 Ala. 380; Grace v. Hale, 2 Hump. (Tenn.) The title to the whole or any of this property which she claims by virtue of a gift from her second husband is not in my opinion sustained by the evidence. She says that while entertaining the intention of leaving her he gave to her all this property; two months afterwards when the attachment was levied his intention of deserting her had been abandoned or revoked, and he is found in possession of all the property as husband just as before. There is no evidence that he held this property to his wife's separate use after his return. The possession of his property was as complete as the possession of his wife. I think the evidence fails to show a complete and perfected gift.

It is objected by appellants that the judgment was erroneous as being in part a general judgment against a married woman. Under section 2903, Revised Statutes 1879, it is provided that the judgment for defendant shall be against plaintiff and his sureties. One of the plaintiffs is a married woman, and it is claimed that a general judgment cannot be rendered against her for anything done by her during coverture. A married woman is not liable on her contracts made during coverture, and no personal judgment can be rendered against her on account of them. She is liable conjointly with her husband for her torts committed during coverture, and a general judgment against her and her husband can be rendered therefor. Cooley on Torts, 115; Schouler Dom. Rel., 102, 103. This liability relates only to such torts as she may have committed out of his presence and without his order or consent, otherwise he is liable alone for them, and she is exempt upon the presumption of being induced to commit them under his coercion. If she had taken and carried off the goods she sues for under the order of her husband, she would have been exempt from liability. She has, in conjunction with her husband,

obtained possession of the goods by employing a process in a case where it would not lie and in doing this she was presumably acting under the order of her husband, which would relieve her if it was an open trespass. It has been held that a general judgment for money cannot be rendered in a replevin suit against a married woman. Long v. Cockrell, 55 Mo. 93. Judge Vories rendering the opinion seems to think that the only appropriate remedy for the defendant in such case is to enforce a dismissal of the suit and bring an action against the sureties on the bond. In the case decided by him the husband was not as in this case joined as a party plaintiff. He leaves the propriety of taking a judgment against the principals and sureties as far as it can be given in the replevin proceeding undecided by the remark which concludes his opinion. "At least no personal judgment could be rendered against a married waman." It is well settled that the sureties are not relieved from the obligation of this bond by the coverture of the principals or any of them. Weed Sewing Machine Co. v. Maxwell, 63 Mo. 486. Now when the sureties in this case signed the bond they well knew that no judgment could be rendered against one of the plaintiffs in the replevin suit or anywhere else. They knew that their chief principal was the husband and that the wife was not bound. The judgment against the wife was erroneous under our decisions, but I see no good reason for remitting the defendant to his common law action on the bond. I think the defendant in the replevin suit is entitled to judgment against as many as are legally liable on the bond. This is all he could achieve in an independent suit, and I think it does not lie in the mouths of the sureties, who by signing the bond enabled the plaintiffs to obtain possession of property to which they were not lawfully entitled, to maintain an exemption from the judgment incident to the action. I think the judgment, according to the forms of the statute, should be rendered against them as far as it can be legally done.

McKee v. Calvert.

Accordingly the judgment of the circuit court is reversed and the cause remanded, with instructions that a new judgment be entered that the defendant is entitled as against the plaintiffs to the right of property in the chattels sued for, and that defendant have leave to ask and take a judgment against Simeon Alexander and the sureties on the replevin bond for return of the property, or in his discretion, or in event a return cannot be had, a judgment for the value thereof as heretofore found against the said Simcon and the sureties on said replevin bond and for costs. All coneur.

McKee v. Calvert et al., Appellants.

- Practice in the Supreme Court: BILL OF EXCEPTIONS. Where neither the motion for new trial nor that in arrest of judgment is preserved in the bill of exceptions, this court will only review such errors as are apparent in the record proper.
- Petition: ASSAULT AND BATTERY. A petition for assault and battery which does not charge that the assault was wrongful, but alleges that it was "with force and arms," is good after verdict.
- 3 —: : GENERAL VERDICT. One good count in a petition containing two counts for the same cause of action, will support a general verdict.

Appeal from Clark Circuit Court.—Hon. Andrew Ellison, Judge.

AFFIRMED.

Matlock & Hiller and Berkheimer for appellants.

The petition does not allege that the assault was committed in a wanton, malicious, rude and aggravated manner, or dictated by a deliberate intention to vex, degrade and insult plaintiff. *Green v. Craig*, 47 Mo. 90. And there was no evidence that the assault was committed in such

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manner and with such intention, and the court should not have instructed for exemplary damages, plaintiff only being entitled to actual damages. Sedgwick on Dam., (4 Ed.) pp. 32, 610; Plummer v. Hurburt, 5 Clark (Iowa) 308; Buckley v. Knapp, 48 Mo. 153, and cases cited; Milburn v. Beach, 14 Mo. 104; Graham v. Railroad Co., 66 Mo. 536; Engle v. Jones, 57 Mo. 316.

D. H. McIntyre and F. M. Brown for respondent.

Neither the motion for new trial nor that in arrest of judgment, is incorporated in the bill of exceptions. This court, therefore, will not notice any of the alleged errors occurring at the trial. Collins v. Barding, 65 Mo. 496; Jefferson City v. Opel, 67 Mo. 394; Robinson v. Hood, 67 Mo. 660. The petition properly states a cause of action. O'Leary v. Rowan, 31 Mo. 117; 2 Estee's Plead., pp. 1, 4.

Philips, C.—This is an action for damages for an assault and battery. Verdict and judgment for plaintiff for the sum of \$250. Defendant has brought the case here on appeal. Neither the motion for new trial nor in arrest are preserved in the bill of exceptions, and therefore no alleged errors committed in the progress of the trial can be considered or reviewed by this court. Collins v. Barding, 65 Mo. 496; Jefferson City v. Opel, 67 Mo. 394; Robinson v. Hood, 67 Mo. 660; State ex rel. Estes v. Gaither, 77 Mo. 304. On this record no errors are reviewable save such as are apparent in what is known as the record proper.

It is objected to the petition that it does not state facts sufficient to constitute a cause of action. It charges that on the 13th day of February, 1880, at the county of Clark, State of Missouri, with force and arms, the defendant assaulted, beat and bruised, cut and wounded the plaintiff, by reason of which he sustained damage in the sum of \$1,000, for which he prayed judgment. For further cause of action it is alleged that on the day and place aforesaid,

the defendants did unlawfully, with their fists, sticks, knives, and other sharp instruments, assault, beat, and bruise and wound plaintiff, and other wrongs and injuries to plaintiff then and there did, by reason of which he had sustained damages in the sum of \$1,000, for which judgment is prayed.

The only tangible objection to the petition occurring to us is, that it is not affirmatively averred in the first count that the assault was wrongful, but it is alleged that it was "with force and arms," and this we think would be good after verdict. The second count was unquestionably sufficient. And while the petition apparently counts as if for two separate causes of action, they are manifestly for one and the same assault and battery. In such case the good count will support a general verdict for the plaintiff. Brownell v. Pacific Railroad, 47 Mo. 240.

We perceive no reversible error in the record, and the judgment of the circuit court is therefore affirmed. All concur.

Musser. Appellant. v. Brink.

- Supreme Court: FORMER DECISION IN SAME CASE. The Supreme Court, on a second appeal in a cause, will follow its previous decision, unless the facts developed on the re-trial require a different decision as applicable thereto.
- 2. Partnership: Landlord and tenant, as a part of the consideration for the lease of a farm, that the landlord shall furnish stock enough to eat the hay, oats and corn raised on the demised premises, the tenant to feed the stock, and upon sale being made, the landlord to be re-paid his purchase money first, out of the proceeds, and the remainder to be equally divided between the parties, does not constitute them partners in respect to the stock bought and fed under the agreement, following and re-affirming same case, 68 Mo. 242.

Injunction. The property in the cattle, under the agreement, remained in the landlord, and the contract having given the tenant no right to remove them from the farm or to dispose of them without the landlord's consent, injunction lies to prevent him from doing so. 68 Mo. 250.

Appeal from Livingston Circuit Court:—How. E.J. Broaddus, Judge.

REVERSED.

C. H. Mansur for appellant.

The law of this case was decided in appellant's favor when the case was here before, (68 Mo. 242,) and it is now res adjudicata. Wells on Res Adjudicata, §§ 513, 617; Phelan v. San Francisco, 20 Cal. 45; Thompson v. Dill, 34 Ala. 534; Hawley v. Smith, 45 Ind. 183. The facts as developed on the re-trial, do not take the case out of the doctrine of res adjudicata.

John A. Cross and John E. Wait for respondent.

The parties to the contract were partners as the case now stands, conceding the correctness of the former decision. 68 Mo. 242. In determining the meaning of a written instrument, the acts of the parties are entitled to great weight. Patterson v. Scott, 24 N. Y. 40; Gunnison v. Bancroft, 11 Vt. 493; People v. Gosper, 3 Neb. 285; Nash v. Town, 5 Wall. 689; Ricker v. Fairbanks, 40 Me. —; Cook v. Barr, 39 Conn. 296. An injunction will not be granted when the right is doubtful. Water Co. v. McCallum, 5 Pa. St. 93. Nor because of the mere apprehension of the petitioner that a wrong may be done. Goodwin v. Railroad Co., 43 Conn. 494.

EWING, C.—This case was before this court in 1878, (68 Mo. 242,) and was reversed and remanded. Upon the hearing at that time, the petition, answer and contract were set out in full, with the evidence at the former trial; and

so far, reference is had to that report. It is not necessary, for a full understanding of the questions involved, to re-state the pleadings and contract. On the new trial there was additional evidence on the part of the plaintiff; and the defendant offered evidence to maintain the issues on his part. At the first trial the defendant offered no evidence.

The plaintiff introduced William Middaugh, who said defendant told him, he had ordered Musser off the place. Said he was going to send the cattle to DeKalb county; said he had a right to sell them, but wanted to feed up the crop. That Musser came to his house in July, and at his request went to see Brink, and told him Musser had sold the cattle, and if he, Brink, would meet him at Cameron he would settle with him.

Angeline Moss testified, that at her house in February, 1875, she heard Brink say he intended to sell the cattle and put the money in his pocket. On cross-examination this witness said Brink said Mr. Musser would not beat him much.

A. W. Frederick, for plaintiff, testified that Brink told him he proposed taking the cattle to DeKalb county, north of Osborne. That Musser owned half the crop and the farm.

S. J. Moss had conversation with Brink on Musser's farm about September, 1874, about the cattle. Brink said he wanted me to herd them for him next summer in DeKalb county. Musser was present and said Brink was all right, and would do as he said. In February, 1875, Brink then told me Musser had become dissatisfied about the cattle; that he intended to take and herd them in DeKalb county, and said he did not think old man Musser would beat him much; that he intended to sell the cattle himself.

B. F. Jones testified: In the fall of 1875 stayed all night at Brink's. He said he had intended to take and herd them in DeKalb county; that he had, or claimed the right to sell them, and that Musser would never have known it if Moss had not betrayed him; that he knew it was Moss,

because he had not told any one else he intended to sell them.

Geo. Smith testified as to the financial standing of Brink; that he had no real estate, and was worth probably \$800 or \$1,000, "outside of his household plunder."

Solomon Musser, on his own behalf, testified as follows: September, 1874, I had eighty head of cattle on the farm of Conrad Smith, in Daviess county, about fifteen miles from my place in Caldwell county, where defendant lived; they were two-year-old past steers. I turned them over to defendant at a value of \$2,200 at that time. He gave me a receipt for them. He was to take them into his possession at Coon Smith's, and was to pay for their herding up at Smith's until feeding time came that fall. I was present at the conversation when S. J. Moss was pres-At that time I had confidence in Brink, and made no objection when he proposed to take or send the cattle the next spring and summer to DeKalk county to herd. Did not know at that time he claimed any right to sell the cattle under the agreement. During that winter I became much dissatisfied with Brink, and with his management on my place. Under the agreement, he was to feed hogs on the place with our joint corn. When I was at the place I learned, and could see, that hogs had been fed, but could not find the hogs; could see where they followed the cattle, but the hogs were not in sight. I learned that he had fattened twelve hogs and sent them to Lathrop to sell that He also sold some hogs in Cameron, but don't know how many. I think he sold in all about \$600 worth. About April, 1875, I learned he was determined to remove the cattle out of the county; I opposed it. I met Brink at the farm of Stucker, about a mile and a half from where Brink lived. I there told him I did not want the cattle moved. He then proposed to give a bond, for the purpose of securing and returning me the cattle. Proposed to give me one Fowler, of Ray county, on the bond. Wanted me to go with him to Ray county to see Fowler. I never told him

whether I would or not accept the bond. Do not remember that he proposed to give Dr. Crawford on the bond. Next day word came to me that Brink said he intended to remove the cattle. I went that night to Kingston, the county seat, and got out the papers for this injunction suit, and the next day the sheriff and myself went to Brink's to serve them. We got there early. Before I got there, I told the sheriff to say nothing about it until I could talk with Brink, as I wanted to have a talk with him, and I might be able to compromise it with him. We both went into the house and sat down, when Brink said, I suppose you have come to attach the cattle. I told him I had no attachment, whereupon Brink jumped up out of his seat, got very mad, accused me of swindling him in a receipt I had given him for some pasturing the fall before, and ordered me off the place, and forbid me ever to come back or set foot on the place while he was on it. I then got up and told the sheriff to do his duty and left.

Cross-examination: The fuss I had with Brink when the sheriff was there, took place just as I have told it. It was not over something else. I will state it again, just as it was, and let the judge decide what it was. Brink said, I suppose you have come to attach the cattle. I said I had no attachment. He then got mad and accused me of swindling him in a receipt about pasturing some cattle the fall before, and ordered me off the place. The receipt Brink gave me for the cattle I left at home. I did not know it would be wanted here. I had no notice to bring it. I think it reads about like this: September, 1874. I hereby receipt for eighty head of two-year-old past steers, to Solomon Musser, and guarantee him in payment for them \$2,200, and one-half of the profits of feeding them for market, and I am to pay Conrad Smith's bill for herding them. I sold the cattle in July, 1875. I am to pay Brink one-half the profits, and I am to pay for herding the cattle until feeding time. Brink did talk about giving me a bond, but it was never agreed upon or completed. Neither the amount nor

who should go upon it. I never said I would take it, nor do I know that I said I would not. We were talking about it when I learned he was going to move the cattle, and I got out the injunction. I don't remember any talk about Crawford going on the bond.

Plaintiff then read in evidence the written contract, which will be found in 68 Mo. 242, and rested.

The defendant introduced Dr. Crawford, who testified he would have gone on Brink's bond to secure Musser's share of the cattle.

Al. Stucker, for defendant, testified: Musser and Brink were at his house and talked about removing the cattle to DeKalb; Musser told Brink he was opposed to his moving the cattle, and that he must not take them. Brink said he would give bond to secure Musser, and said he could give Fowler of Ray county, and Dr. Crawford, but did not tender a bond.

Francis M. Brink testified as follows: I am the defendant in this suit. I never told anybody that I intended to sell the cattle. I wanted to keep them and feed them, so as to get pay for my crop raised by feeding the cattle, as I was to be at all the expense of feeding the cattle, and as they could be herded much cheaper than I could get pasture to keep them in, I wanted to send them to DeKalb county to herd them on a section of land I had leased for that purpose. Musser was willing when I got the cattle first to have them taken there, but in the winter we began to have difficulties over the cattle and management of his farm by me, and then we had trouble. I did think I had the power to sell the cattle under the agreement, but I intended always, if I sold them, to pay Musser what was due him. I never intended to beat him out of his cattle. When spring came, as it was much cheaper to herd than to pasture, I was anxious to herd. I met him at Stucker's, and there I told him I would give him bond to secure him; that I would give him Fowler of Ray county, and Dr. Crawford. We talked the matter over. I did not arrange it

then with him, but intended to arrange and give him bond. but before I could do so, he got out this suit. When he and the sheriff came to my house I invited them in as kindly as I knew how, and commenced a talk with Musser, when Musser got mad and told the sheriff to levy upon the cattle. We did not quarrel over the receipt for pasture, but quarreled over his wanting to get the cattle away from me. I never told any one that I intended to sell the cattle. or that I intended to beat Musser; never told S. J. Moss nor Angeline Moss that I intended to sell the cattle; never told Jones, a witness in this case, that Moss had betrayed me to Musser. I was worth, at the time the cattle were enjoined, as follows: I had about \$600 I got from the sale of some land in ---- county. This I had in the hands of Dr. Crawford. I had besides, about \$800 in money, and then I had my teams, farming implements, household plunder, etc., about \$1,000 more. I kept a money account with Dr. Crawford, and one at the bank in Cameron. Can't state how much I kept on an average with Dr. Crawford; can't state how long the \$600 staid with him; can't state whether I drew it out in large or small sums; don't know how long I left it with him; can't state that I kept an average of \$300 with Dr. Crawford or not. I kept money in the bank at Cameron all the time I was on Musser's place, and whenever I wanted money for any purpose I checked it out. I did know at Stucker's that Musser was opposed to my taking the cattle to DeKalb county. I do not now, nor did not pretend at any time, to set up any other claim or right or control over the cattle, than such as I may have by virtue of the agreement read in evidence, dated March 13th, 1874. I did fatten and sell a lot of hogs to Lathrop. twelve in number, they were my own hogs, and I fattened them with my own crop of corn, raised on Gov. Smith's place in 1873. I kept my crop of corn over that year. It was worth about \$200. I fed it mainly, and sold it together to live upon, during the year 1874. I never told anybody that I intended to beat Musser. I did say to Timmons that

I would rather give him every hog I had for nothing than that Musser should get one of them. I took fifty odd stock hogs of my own on Musser's place when I went there. I fed them during the winter of 1874, out of my own corn, the old crop raised the year before on Gov. Smith's place. I did sell some fat hogs of my own that year and some I think at Kidder.

This was the evidence in the case, and that of plaintiff and defendant is given in full.

The vital question in this case is the construction of the written agreement. It is insisted by the respondent that the evidence so materially changes the facts as that the contract must be construed as a partnership; that the contract must be construed in the light of the receipt given guaranteeing the \$2,200, etc. That it is a question of preponderance of evidence. It is not a question of preponderance of evidence, but of construction of the written instrument; and unless the trial de novo, after reversal, developed facts which so changed the nature of the case as to require a different construction as applicable thereto, then we must follow the decision in 68 Mo., supra. In that case, Sherwood, C. J., said: "If we test the case at bar by the rule thus announced, it is very easy to see that the agreement in question does not evidence a partnership, and this, for the reason that it does not confer on each party power to manage the whole business and dispose of the property." The new evidence on the trial was the receipt sworn to by Musser and the testimony of Brink himself. Brink's testimony consisted mainly in contradicting witnesses who had sworn differently to himself, a number of whom corroborated each other upon the controverted points, and on this point we have no hesitation in holding that the additional evidence on the new trial does not change the facts "so as to require a new decision as applicable thereto." Wells on Res Adjudicata, § 619.

II. The remaining question is, under the evidence, did the circuit court err in refusing the injunction? The

circuit court could only refuse the injunction upon the theory that the written instrument in evidence constituted plaintiff and defendant partners; but under the construction placed upon the contract by this court, it would necessarily follow, as Justice Sherwood said, "that the property in the cattle remained in plaintiff, and no right to dispose of them was conferred by the contract on the defendant, nor to remove them from the farm of the plaintiff without his consent."

This being so, the evidence, we think, clearly made out a case for the granting of an injunction. And we therefore reverse the judgment below and remand the case, with instructions to the circuit court to make the injunction perpetual. All concur.

THE STATE V. SHADD, Appellant.

Criminal Law: EMBEZZLEMENT: AGENT: COMMISSIONS. One who auctions off "pools" upon a horse race, and receives the money of the purchaser, and gives a receipt therefor, is the agent of such purchaser, and if he converts such money to his own use with intent to deprive the owner of its use and value, he is guilty of embezzlement, although the money was placed in his hands for an immoral purpose. But where such agent is to receive a per cent of the money bid and placed in his hands, such per cent should be deducted from the amount, and the offense will not be a felony if such deduction reduces it below \$30.

Appeal from Greene Circuit Court.—Hon. W. F. Geiger, Judge.

REVERSED.

Charles T. Noland for appellant.

Defendant was a simple debtor to Holman and could

not be guilty of embezzlement, he having the title to Hol-Welch v. People, 17 Ill. 341; Stinson v. Peoman's money. ple, 43 Ill 397; Comm. v. Stearnes, 2 Metc. 347; Comm. v. Libby, 11 Metc. 64; People v. Howe, 2 N. Y. Sup. Ct. (N. S.) The contract was founded upon an immoral transaction, hence there was no valid agency and no embezzlement. Hayden v. Little, 35 Mo. 418; Benson v. Hickman, 8 Mo. 8. The case made by the State does not come within the purview of the statute. The statute was passed to protect the legitimate use of property, not to regulate the morals of gamblers or their gambling contracts. People v. Stetson, 4 Barb. 151; People v. Clough, 17 Wend. 351; People v. Williams, 4 Hill 9; People v. Wilson, 6 John. 319; Reg. v. Hunt, 8 Car. & P. 642. If defendant was not a simple debtor he was a bailee, and cannot be convicted under section 1320, Revised Statutes. He should have been indicted under section 1322. Hammel v. State, 5 Mo. 260; State v. Meyers, 68 Mo. 206. Defendant was part owner of the money, having a tenth interest in it, and embezzlement will not lie. Reg. v. Bren, 1 Leigh & C. 346. Even if defendant was guilty of embezzlement, he was not guilty of a felony. He received \$33, and after deducting his ten per cent the amount embezzled was only \$29.70. The court should have defined the term "reasonable doubt." State r. Lewis, 69 Mo. 92.

D. H. McIntyre, Attorney General, for the State.

Embezzlement, or larceny to which it is closely allied, "is a crime against society and should be punished on account of its own inherent meanness and criminality, as well as on account of the less important rights of property." Such has always been the rule in larceny. "Goods stolen from a thief may be charged as the goods of either the thief or the true owner." 2 Bishop Crim. Law, (7 Ed.) § 789; 2 East P. C., p. 654; Ward v. People, 3 Hill (N. Y.) 395; 6 Hill 144; State v. May, 20 Iowa 305; Comm. v. Rourke, 10 Cush. 397; Comm. v. Smith, 129 Mass. 164;

Bales v. State, 3 W. Va. 685. The same principle applies in embezzlement. It is no defense that the money was received for an illegal purpose. Comm. r. Cooper, 130 Mass. 285; State v. Tumey, 81 Ind. 559. Defendant was an auctioneer, and, therefore, the agent of the buyer and within the provisions of section 1320, Revised Statutes. Story on Agency, (9 Ed.) § 27; Wharton's Law Lexicon, p. 74. If not an auctioneer he was a broker and an agent still. Story on Agency, (9 Ed.) § 28. It makes no difference that the owner parted with his money voluntarily, and that defendant received it from the hands of his employer. People v. Hennessey, 15 Wend. 147; People v. Dalton, 15 Wend. 581; Lowenthal v. State, 32 Ala. 589; State v. Foster, 37 Iowa 404; 2 Bishop Crim. Law, (7 Ed.) § 366. Nor that he mixed it with his own funds. 2 Bishop Crim. Law, (7 Ed.) §§ 370, 371; Comm. v. Tuckerman, 10 Gray 173. The fact that defendant was to receive a commission did not make him a part owner of the money. 2 Bishop Crim. Law, (7 Ed.) § 341; Reg. v. Bailey, 12 Cox C. C. 56.

Norton, J.—The defendant was indicted in the circuit court of Greene county, at its November term, 1883, for embezzlement. He was tried and convicted, and his punishment assessed at three years' imprisonment in the penitentiary. The case is before us on his appeal.

It appears from the record that defendant, in August, 1883, was engaged in selling "pools" on horse races about to be run at the Driving Park grounds at Springfield; that defendant stood up in a stand, and cried out for bids for first choice, and awarded to the party making the highest bid the first choice; the party then named the horse which he believed would win the race, and deposited with defendant the amount of money bid by him. A large number of pools were sold, and the parties buying and depositing their money looked to the pool-seller to pay their wager if they won. If they lost, they were to receive nothing. To each one buying a pool he gave a card as follows:

No	
	Association Pools.
Mr	•••••
Horse	***************************************
	Amount paid, \$
	Amount in pool, §
	CHARLES SHADD, Auctioneer.

It was understood and agreed that defendant was to receive ten per cent commission on the money deposited. It was shown by the evidence that one Holman, under the above arrangement, deposited with defendant \$33, and it is for the embezzlement of this sum that defendant is prosecuted in this proceeding.

Holman lost \$5 and won \$10, and a race upon which \$18 was bet, was not run on account of rain. Holman testified that he placed his money in defendant's hands, saw him intermingle it with other money, use it in making change and made no objection, and did not expect the return of the identical money he deposited; that he presented his tickets and demanded of defendant the amounts called for, which he declined to pay until the judges made a final decision on the races. It also appears that defendant ran away that night without paying Holman, taking with him all the money in the pool, and that when arrested near Rolla, in a different county, he had \$265 concealed on his person, and \$5.70 in a pocket, and when the sheriff making the arrest found the \$265, defendant said "that is the money you are looking for; that \$5.70 is my own money."

On this state of evidence the court gave several instructions, to the effect that if the jury believed Holman deposited \$33 with defendant, under the circumstances above set forth, and that defendant converted the same to his own use, against the will and consent of Holman, and took and carried the same away with the intent to deprive Holman of it, and convert it to his own use, that he was guilty of a felony, and that they should so find.

The court refused to instruct the jury, as asked by defendant, that if, when the money was deposited, it was the understanding that defendant was to receive ten per cent of it for commission, and if, after deducting such commission from the amount deposited, the remainder would be less than \$30, they could not convict defendant of a felony. The court also refused to tell the jury that if they believed that defendant paid out by direction of Holman the \$5 lost by him, that it should be deducted from the amount deposited in estimating the amount defendant was charged with embezzling. The court also refused to instruct the jury, that if they believed defendant was appointed and acted as the agent of parties described in the indictment in the furtherance, or carrying out a transaction which was immoral and against public policy, they should acquit defendant.

It is claimed by counsel that the refusal of the above instructions, as well as its action in giving instructions on the part of the State, was erroneous. It is argued in support of the objection to the instructions given for the State, that under the evidence defendant simply became the debtor of Holman, and not his agent. We think this point is not There is nothing in the evidence tending to show that it was the intention of the parties to create the relation of debtor and creditor; the tickets given by defendant were in the nature of receipts to the various parties depositing money with him, and tend to show an agency on the part of defendant with reference to the money thus placed in his hands. But it is plausibly argued that if defendant was an agent, that inasmuch as he was holding the money for an immoral purpose, that he could not, for that reason, be convicted of embezzlement. While some of the authorities to which we have been cited, seem to give color to this idea, we think the true and better rule is laid down in the case of Commonwealth v. Cooper, 130 Mass. 285, which was a prosecution for embezzlement, in which defendant was charged with embezzling a check of the value of \$200,

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the property of one Wood. The defendant contended that his contract with Wood was a gambling contract, and was illegal under the statute, and that even if he had appropriated the margin he could not be convicted of embezzlement. The court held that there was no evidence that Wood contemplated or authorized the defendant to enter into any gambling or illegal contract, and "if he had, the check or money sent by him would remain the subject of larceny or embezzlement; and if the defendant fraudulently appropriated it to his own use, it would be no defense to an indictment by the government for embezzlement to show that the property had been entrusted to him for an illegal purpose." State v. Tumey, 81 Ind. 559, is to the same effect.

It is also claimed that the court erred in refusing defendant's instructions, in effect, telling the jury that in estimating the amount embezzled they should deduct ten per cent of the amount deposited, and that if they believed the \$5 lost by Holman was paid out by defendant, by direction or with the consent of Holman, it should also be deducted. We think this point well taken. The evidence clearly showed that defendant was entitled to ten per cent of said amount deposited, and tends to show that he was authorized to pay out \$5 lost by Holman.

For the error indicated, the judgment will be reversed and cause remanded. All concur.

Roberts et al., by Guardian, v. Ware, Appellant.

Homestead: conveyance by widow: MINOR CHILDREN. Under section 5, Wagner's Statutes, page 698, notwithstanding the sale and conveyance of the homestead by the widow, the minor children, until they maintain their majority, are entitled to its exclusive possession as against her vendee.

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Appeal from Nodaway Circuit Court.—Hon. H. S. Kelley, Judge.

· AFFIRMED.

Edwards & Ramsay for appellant.

The widow being the head of the family, the domicile of the minor children must follow hers, and if she sell and convey the homestead and abandon it, the children are bound. Howe v. Adams, 28 Vt. 545; Wright v. Dunning, 46 Ill. 271; Danton v. Woodbury, 24 Iowa 74; Orman v. Orman, 26 Iowa 361; Tadlock v. Eccles, 20 Tex. 792; Brewer v. Wall, 23 Tex. 589; Thompson on Home., § 570.

White & Alderman for respondents.

Plaintiffs are entitled to the possession of the premises as the minor children of their deceased father. Wag. Stat., p. 698, § 5; Skouten v. Wood, 57 Mo. 380. Minor children are incapable either by act or declaration of abandoning their homestead right. Thompson on Home., § 243; Booth v. Goodwin, 29 Ark. 633. The acts of the widow did not affect their rights. Johnson v. Turner, 29 Ark. 280; Phipps v. Acton, 12 Bush (Ky.) 375.

Ewing, C.—This is a suit in ejectment, by plaintiffs against the defendant, to recover possession of the south half of the southwest quarter section 14, township 65, range 37, containing eighty acres; and also a certain part of lot 4 of the northwest fractional quarter of section 20, township 65, range 37. The defendant, after denying specifically the allegations in the petition, says:

Defendant, for further answer and defense, states that on or about the —— day of January, 1874, David Roberts died intestate; that prior to and at the time of his death, he was the husband of one Elizabeth Roberts, and was a house-keeper and the head of a family, and seized in fee simple

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of and occupied the lands described in said petition, as and for his homestead; that said lands did not exceed ninety acres in all, and were of less value than \$1,500; that immediately on the death of said David Roberts, said lands and homestead passed to and vested in fee simple in said Elizabeth Roberts, her heirs and assigns forever; that by the death of said David Roberts, as aforesaid, the plaintiffs, David Roberts and Mary F. Roberts, as her minor children, obtained a right to remain upon said homestead jointly with said Elizabeth Roberts, who is their mother, until they should attain their majority, unless they should sooner lose the same by abandonment; that after the death of said David Roberts, his said widow, Elizabeth, married one Lemuel Shirley, and afterward, to-wit, on the 15th day of August, 1877, said Elizabeth Roberts, then Shirley, sold the land described in said petition, being her homestead, as aforesaid, to the defendant, for the consideration of \$200, to be paid by defendant; and at the date last aforesaid she, with her said husband, Lemuel Shirley, executed and delivered to defendant their joint deed of that date, signed, sealed and acknowledged by them, and that the said Elizabeth Shirley, at the date of the execution of said deed, and in pursuance of said purchase, wholly and forever abandoned said premises, together with her minor children, plaintiffs herein, to defendant, and delivered to him the possession thereof, which he still holds under said purchase and deed, claiming title to said premises thereunder, in fee simple; that said minor children by the said sale and abandonment of said homestead by their mother, have surrendered and lost their right of possession thereto.

The plaintiffs' reply denied that the land descended to and vested in Elizabeth Roberts and her heirs in fee simple; denied that she sold or intended to sell to defendant, anything more than her dower right; that Ware intending to cheat and defraud her, made false representations to induce her to sell and give possession of the premises, and denied

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an abandonment by the plaintiffs, but that they are minors living with their mother and went with her.

The following admissions were made on the trial: "That David Roberts died, seized in fee simple of the south half of the southwest quarter of section 14, also ten acres being part of lot 4, of the southwest fractional quarter of section 20, all in township 65, range 37, in Nodaway county, Missouri; that at the time of his death, in January, 1874, he occupied said land as his homestead; that plaintiffs, David Roberts and Mary F. Roberts, are minor children of said David Roberts deceased, the one aged five and the other seven years, and are living with their mother; that Elizabeth Roberts, now Shirley, is the mother of said children, and was the widow of said David Roberts, deceased, and so remained until she married Lemuel Shirley; that said Lemuel Shirley and Elizabeth Shirley jointly executed a quit-claim deed for the land above described, for the consideration of \$200, mentioned in the answer."

The other evidence was nearly altogether as to the value of the land, and as to the alleged fraud of the defendant in procuring the deed to the land in controversy. But as those questions are not material in this case, that evidence is not further referred to. The court below found for the plaintiffs, and the defendant, Ware, brings the case here on appeal.

The decision of this case depends on the construction of section 5 of the Homestead Law then in force. 1 Wag. Stat., p. 698. This section was passed upon as far back as 57 Mo. 380, in the case of Skouten v. Wood, where it was held that the widow and children took the same estate which was in the father at the time of his death; that at the death of the widow it would descend to her heirs subject to the homestead right of the children of the father during their minority. Fruend v. McCall, 73 Mo. 343; French v. Stratton, 79 Mo. 560. In this case, under the Homestead Law then in force, the widow and children took this land as a homestead. The widow in fee subject to the

homestead right of the minor children during minority. The widow cannot hold to the exclusion of the minor children, nor can they hold to the exclusion of the widow. It is a homestead for one as much as the other, and must be held as such. It cannot be divided up amongst those entitled thereto, but must be held as the home of the widow and children to the exclusion of all others. Canole v. Hurt. 78 Mo. 649. This being true, the vendee of the widow cannot oust the minor children during their minority. And they are entitled to the possession of the homestead premises to the exclusion of the defendant, and must recover in this suit. The object of the statute was to provide a homestead for the widow and children. Whatever right, if any, defendant Ware may have in the premises under his deed from the widow, will attach at the majority of the minor plaintiffs, provided he has a good and valid title to the widow's interest therein. We do not pass upon the validity of the deed from Mrs. Shirley to Ware, because that question is not before us.

The judgment of the circuit court is affirmed. All concur.

CHRISTAL V. CRAIG, Appellant.

- Pleading: JOINDER OF DIFFERENT CAUSES OF ACTION: SLANDER.
 While under the code, in an action for slander, causes of action for
 words imputing to plaintiff the crimes of perjury, larceny and adultery may be united in the same petition, they should be separately
 stated, withthe relief sought for each cause of action.
- MISJOINDER IN SAME COUNT: WAIVER. Where such causes of action are joined in the same count of the petition, and defendant does not move for a rule requiring plaintiff to elect, the objection of such misjoinder is waived.
- Several Causes of Action: GENERAL VERDICT. But if one or more of the causes of action thus united in the same count be fatally defective for failure of sufficient statement of facts to constitute a

cause of action, a general verdict is erroneous as to all of the causes of action.

- 4. Pleading: SLANDER. The statement of a cause of action for slander, for words imputing to a woman the crime of adultery, should contain an averment of her coverture, and in the absence of such averment, no instruction should be given as to said cause of action.
- 5. Slander: PLEADING: EXPLANATORY AVERMENTS. The words "You have took my pocket book and money, and have got it there in your bucket," are not actionable per se, and in an action for slander therefor the petition must contain explanatory averments showing their application and the imputation intended to be conveyed thereby.
- ----: VARIANCE. In an action for slander, it is not sufficient that
 the offense proved be equivalent to or substantially the one alleged;
 the phraseology must be the same.
- Pleading, Code: AD DUMNUM CLAUSE. Under the code, a petition
 is not defective because it does not contain an ad damnum clause; it
 is sufficient in this respect if it contains a prayer for judgment for
 the damages demanded.
- 8. Evidence: REBUTTAL: ADMITTING EVIDENCE OUT OF ITS ORDER. Evidence proper to be offered in chief, should not be admitted under the semblance of evidence in rebuttal, and while trial courts have a discretion in admitting evidence out of its regular order, such discretion is not an arbitrary one, but is judicial in its character and only to be exercised in the furtherance of justice.
- 9. Slander: EVIDENCE. Proof of the repetition of the slander alleged, after the time of the utterance, may be given in aggravation of damages as showing the quo animo, but evidence which is neither within the allegations of the petition nor rebuttal in its character, is not admissible.
- 10. ——: VARIANCE. An instruction in an action for slander, that if the words proved have the same sense as those alleged, there is no variance, is erroneous.

Appeal from Macon Circuit Court.—Hon. Andrew Ellison, Judge.

REVERSED.

Dysart & Mitchell for appellant.

The petition is fatally defective in having no ad damnum clause. R. S. 1879, §§ 3511, 3512; Devean v. Skidmore, 19 Am. Law Reg. 784; Brownson v. Wallace, 4 Blatch. 465;

Bumpass v. Webb, 3 Ala. 109. Plaintiff's third instruction was erroneous. Bliss on Plead., § 305; Dyer v. Morris, 4 Mo. 214; Curry v. Collins, 37 Mo. 324; Rammell v. Otis, 60 Mo. 365; Hall v. Adkins, 59 Mo. 144. Plaintiff's fourth instruction was also misleading and improper. Berry v. Dryden, 7 Mo. 324: Birch v. Benton, 26 Mo. 153.

Berry & Thompson for respondent.

There is no misjoinder of causes in the petition. It states but a single cause of action. Pennington v. Meeks, 46 Mo. 217; Palson v. See, 54 Mo. 291. If there was an improper joinder of several causes of action in the same count, the remedy was by motion to elect. Mulholland v. Rapp, 50 Mo. 42. A petition is not fatally defective because inartistically drawn. State v. Carroll, 63 Mo. 156. All slanderous words uttered in the same conversation are admissible in evidence. Pennington v. Meeks, 46 Mo. 217. The petition sufficiently alleges that plaintiff was damaged. Bowie v. Kansas City, 51 Mo. 454; Yeates v. Reed, 32 Am. Dec. 42.

Philips, C.—This is an action for slander. The petition contains but one count, though it sets out several distinct causes of action. The first assignment of words spoken is: "You and your mob all swore to lies in the probate court at Macon in my suit against the estate. You and John, Lin and Martha all swore to a lie in that case." The second averment is: "Your son Lin has no father. He never did have any. He don't belong to the Christal family. He is not Stewart Christal's child." Third: "You tied horses on the railroad to get them killed, and you got the benefit of it, and you know you did." Fourth: "You have been all over my place at night, and in my smokehouse pilfering; you have been in my smoke-house a dozen times after night." Fifth: "You let your husband starve to death for want of something to eat." Sixth: "You have took my pocket-book and money, and got it there in your To all of which there was the general averment: bucket."

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"He, the defendant, thereby meaning to charge plaintiff with being guilty of the henious crimes of perjury, larceny and adultery." There was no ad damnum clause to the petition, but the following prayer at the conclusion of the petition: "Wherefore plaintiff prays judgment against the defendant for the sum of \$5,000, for costs," etc. The answer was a general denial.

At the trial the defendant objected to the introduction of any evidence, for the reasons that the petition did not state facts sufficient to constitute a cause of action, because it mingled in one and the same count several distinct causes of action, and because no damages are alleged in the peti-The court overruled the objection. Defendant then asked the court to exclude all testimony on the charge of perjury, for tying horses on the railroad track, and for starving plaintiff's husband, for the reason that the charges are not so pleaded as to constitute any cause of action. This request the court likewise refused. The testimony and instructions in the case will, so far as may be needful, be noticed in the proper connection in the course of this opinion. The jury returned a verdict for plaintiff in the sum of \$500, and judgment was rendered accordingly. From this judgment the defendant has appealed to this court.

I. The petition in this case is bad pleading. It is true, as contended for by respondent, that the same slander may be stated many times, and in different forms in the same count. But I apprehend it will be found on examination of the cases, that the words or utterances thus grouped together in one count, after all, constitute but one substantive offense. The case of Pennington v. Meeks, 46 Mo. 217, referred to by counsel, related solely to one offense, the alleged stealing of a hog. So in the case of Birch v. Benton, 26 Mo. 153, there was really but one actionable speaking alleged, though in different phraseology. The only actionable words alleged were those charging the defendant with adultery. But this petition contains averments in the

same count imputing the crimes of perjury, larceny and adultery. Each of these is a distinct offense for which action might be laid separately. The matter of defense to each might be distinct, and I am of opinion that under the code, while they might all be united in the same petition, they should be separately stated with the relief sought for each cause of action. R. S. 1879, § 3512. Plead., § 125; Pike v. Van Wormer, 5 How. Pr. 171. But is the appellant in a condition to take advantage of the alleged defect? His remedy was clearly to have moved the court for a rule on plaintiff to elect on which cause of action he would go to trial, and to strike out the others. Mooney v. Kennett, 19 Mo. 551; Otis v. Mechanics' Bank, 35 Mo. 128. Having failed to make such motion, the defect of misjoinder is waived. But does the defendant waive anything more? Suppose the fact be in this case that among the causes thus united in the same count, one or more be bad for failure of a sufficient statement, and there is a general verdict on all the causes, would the verdict and judgment be upheld? The rule is well settled that where the petition contains several causes of action stated in separate counts, if one of the counts be bad for insufficiency in statement, a general verdict for plaintiff on all the counts will not be sustained. Brownell v. P. R. R. Co., 47 Mo. 243, and authorities cited. On principle it must obtain that where the several causes of action are united in one count, and the case is tried on all, and a simple verdict and assessment of damages in favor of the plaintiff, if one or more of the causes of action assigned be bad, so as not to support the verdict, the verdict must be bad as to all. How is it possible for the court to tell whether the jury took one or all the alleged slanderous words into their estimation? How much proof of the imperfect cause, and how much on the good, did the jury consider? Was it the fact proved touching the bad count that influenced the verdict, and if so, to what extent? Would the jury have given any damages of moment on account of the words properly alleged in the

petition, without proof of the others? These are difficulties and complications incident to the violation of the rules of good pleading, which suggested themselves to the mind of Judge Scott in *Mooney v. Kennett*, 19 Mo. 553. He clearly indicated the inclination of his mind to the construction we here suggest.

The court below gave, on behalf of plaintiff the fol-

lowing instruction:

3. "If the jury believe from the evidence that the defendant, at the time and place and manner charged, spoke of and concerning plaintiff the following words: 'Your son Lin has no father. He never did have any. He don't belong to the Christal family. He is not Stewart Christal's child,' thereby intending to charge plaintiff with adultery. Or, 'You have been all over my place after night, and in my smoke-house pilfering. You have been in my smoke-house a dozen times after night.' Or, 'You have took my pocket book and money, and have got it there in your bucket,' intending at the time to charge plaintiff with the crime of larceny, then the jury should find for the plaintiff and assess her damages at any sum not exceeding \$5,000."

The first of the charges, it is observed, is that of adultery. Are the facts stated sufficient to constitute the offense? Section 2120, Revised Statutes, makes it actionable to publish falsely that any person has been guilty of adultery. The term "adultery" is employed in this statute in its common law sense or its ordinary acceptation. For the plaintiff, a woman, to be guilty of this offense she must have been married at the time. Abbott's Law Dic., title "Adultery;" 1 Bouvier's Dic., title "Adultery." It is not averred in the petition that the plaintiff was a married woman at the time the child Lin was begotten, or at any other time, nor is there enough averred to legitimately authorize the inferonce. Unquestionably at common law there should have been a colloquium averring her coverture, or the birth of the child in lawful wedlock. Has the statute in any wise obviated or modified the rule? Section 3552, Revised Stat-

utes, declares that: "In the action for slander it shall not be necessary to state in the petition any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff." This provision, however, dispenses with the employment of the colloquium only so far as it shows "that the defamatory words applied to the plaintiff," and goes no further. "All the averments necessary in common law pleading to show the meaning of the words must still be made." Bliss Plead. § 305. The change made by the statute in the rule of pleading in this respect, is not to require a statement of the extrinsic facts showing the application of the words to the plaintiff. But the extrinsic facts, when not embraced in the imputed words to show their meaning and the character of the person to whom applied, must still be stated as at common law. Fry v. Bennett, 5 Sandf. 54; Pike v. Van Wormer, 5 How. Pr., supra; Curry v. Collins, 37 Mo. 328, 329. But it is said the innuendo supplies the defect, in that it says: "Meaning he was not a child of plaintiff's husband." The office of the innuendo is simply to apply the words. It is never a substitute for an averment. It is not the statement of a fact, but an inference. Being merely explanatory in its function, the only question raised by it is, whether the explanation given be a legitimate deduction Authorities cited, supra; Birch v. from the fact stated. Benton, 26 Mo. 154; Bundy v. Hart, 46 Mo. 464. This issue, therefore, was improperly submitted to the jury, and the instruction in that respect was erroneous.

II. Another charge made in the petition, and submitted by the court to the jury is: "You have took my pocket-book and money, and have got it there in your bucket." We do not think these words actionable per se, without some explanatory averment showing their application. If they were intended and understood to impute the crime of larceny, they would be actionable per se. But

the question of pleading is, do they, on their face, without more, convey such imputation? To say you have my pocket-book or money in your bucket, does not necessarily or legally imply its theft. The party might reasonably have so taken it under claim of right, or through mistake or

in sport.

This question is well considered in Andrews v. Woodmansee, 15 Wend. 232. The charge was forgery. The language, inter alia, was: "You have got a note with my handwriting to it. I never signed a note with Andrews. I never put my name to that note, nor gave him liberty to do it in God's world." The words were followed by appropriate The declaration was held to be bad for the lack innuendos. of the extrinsic explanatory matter. The court say: "The conclusion does not follow from the words. Supposing them to be true, the defendant may still have authorized some third person to subscribe his name to the note, or if it be a forgery, the plaintiff may have passed it to Francher without any knowledge of that fact. If the words can be rendered actionable, it cannot be done without some further averment, either about the occasion or manner of speaking them, or the intent with which they were uttered." The doctrine of that case is affirmed in Curry v. Collins, supra. Aside from this, the words laid in the declaration in respect of the pocket-book and money, were not sustained by the proof. The charge is: "You have took my pocket-book and money," etc. The testimony most approximating the language is that of the plaintiff herself. Her version is: "You have got \$35 or \$40 in your bucket you have stole from me." "Yes, you have got it right there in your bucket." Manifestly these are not the actionable words laid, nor indeed, the substance of them. The offense proved may be equivalent to that alleged, but this is not sufficient. Though the charge be substantially the same, yet if in different phraseology it will not support the action. Berry v. Dryden, 7 Mo. 324; Birch v. Benton, supra, 161, 162. In

fact it is very questionable whether any of the charges were sustained in legal strictness by the proofs.

III. (It is further assigned for error that the petition is radically defective in that it contains no ad damnum clause. Under the old system of pleading, it was perhaps, prerequisite to a judgment that the declaration should contain an allegation that the complainant had thereby been damaged, with a prayer for judgment therefor. Deveau v. Skidmore, 47 Conn. 19; Brownson v. Wallace, 4 Blatch. 465. But we incline to the opinion that under our code of practice, the petition in this respect is sufficient. Section 3511, Revised Statutes, requires, "a plain and concise statement of the facts, etc., with a demand of the relief to which the plaintiff may suppose himself entitled." The amount of damages is ascertainable from the facts alleged, and the plaintiff's estimate of them appears from the prayer. This view is supported by Wait's Practice, vol. 2, p. 387.)

IV. The action of the court is complained of in the time of admitting certain testimony, and the character of the testimony. After the plaintiff had rested in chief, and the defendant had closed his testimony, under the semblance of evidence in rebuttal, the plaintiff was permitted to introduce several other witnesses, who testified to various conversations with the defendant, touching what he had said to the plaintiff at the time of uttering the alleged slanderous words. This was not admissible as matter in rebuttal. Evidence in rebuttal is such as tends to disprove "new points first opened by the defendant," and should be accordingly so limited. Trial courts have a discretion in admitting evidence out of the regular order, and even after the case is announced closed on both sides. But this is not an arbitrary discretion. It is essentially judicial, not to be exercised except in the furtherance of justice, as where the party satisfies the court that the omission to introduce the evidence in its proper place and time is the result of mistake or oversight, and then to be admitted only where it will not work surprise and injustice to the opposite party.

Tiernly v. Spira, 76 Mo. 279. One of the witnesses thus introduced in rebuttal was permitted to testify that defendant at one time told him that he (defendant) told plaintiff, "that she and her sons stole sacks of corn from the train on the railroad." "That she had whipped her daughter and made her sleep with a man, and she had to go to St. Louis to have a child, a bastard child." This evidence was incompetent, no matter when offered. It was not rebuttal in its character, nor was it within the allegations of the petition. Proof of the repetition of the slander alleged, may be given after the time of the alleged utterance in aggravation of damages as showing the quo animo. There are authorities supporting the right to introduce distinct utterances of slanderous words for the same purpose. But we are satisfied that neither our system of pleading nor the proper regard for the rights of litigants will permit such wide departures from the issues tendered in the pleadings. It, if tolerated, would beget the grossest abuse in practice. It would make the system of pleading, intended to define and sharpen the matters at issue, a snare and a deception.

V. In the fourth instruction given for plaintiff occurs the following: "If the proof shows the addition or omission of words from those charged not at all varying or affecting the sense of those used in the petition then there is no variance." This portion of the instruction should be omitted. It is calculated to mislead. Words may have the same sense with those used in the petition, yet not support the allegation of the petition. Berry v. Dryden, supra and Birch v. Benton, supra.

The judgment of the circuit court is reversed and the cause remanded for further proceedings in conformity with this opinion. All concur.

Hoyle v. Farquharson.

HOYLE V. FARQUHARSON, Appellant.

- Several Counts: VERDICT ON ONE. Where the petition contains several counts, and all of them are submitted to the jury, who return a verdict for plaintiff on a specified one, this is an implied finding for defendant on the other counts, and the judgment will be a bar to any subsequent suit on the demands contained in the counts not named in the verdict.
- Misjoinder: WAIVER. Misjoinder of causes of action must be taken advantage of by demurrer or answer, or it is waived.

Appeal from Randolph Circuit Court.—Hon. G. H. Burck-HARTT, Judge.

AFFIRMED.

John R. Christian for appellant.

There were five different causes of action stated in the petition, and the verdict being only on one was bad. Mooney v. Kennett, 19 Mo. 552; Clark v. H. & St. J. R. R. Co., 36 Mo. 202; Pitts v. Fugate, 41 Mo. 405; State ex rel. v. Dulle, 35 Mo. 269; City of St. Louis v. Allen, 53 Mo. 44; Owens v. Railroad Co., 58 Mo. 386.

T. B. Kimbrough for respondent, cited R. S. 1879, § 3512; Williams v. Fischer, 50 Mo. 198; Kellogg v. Malin, 62 Mo. 429; Dunn v. Railroad Co., 68 Mo. 279; Reugger v. Lindenberger, 53 Mo. 364; Miss., etc., v. Presby. Church, 54 Mo. 524; Rickey v. Tenbroeck, 63 Mo. 563; Chamberlain v. Smith, 1 Mo. 482.

HOUGH, C. J.—The petition in this case contains five counts, each of which contains a distinct cause of action and a separate demand for damages. The court seems to have regarded the first four counts as constituting but a single cause of action and indeed but a single count and so instructed the jury. Thus instructed, the jury returned a verdict for the defendant on the first count, and found for

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the plaintiff on the second count the sum of \$160. defendant, having pleaded a set-off to what was designated by the court as the first count, the court inquired whether they intended to find any amount for the defendant and they answered in the negative. Thereupon the court instructed them to retire and consider their verdict again, informing them that there were but two counts in the petition, and the jury then returned a verdict for the plaintiff on the second count of the petition for \$160. The defendant's counsel contend that this is a general verdict and that as there are five counts in the petition the judgment cannot be permitted to stand. Such a verdict as this was considered in the case of Marquis v. Clark 64 Mo. 601, and declared not to be a general verdict. Where there is a petition containing several counts, and all of them are submitted to the jury as in this case, and there is a verdict for the plaintiff on one of said counts, specifying which, there is an implied finding against the plaintiff on the remaining counts, and the judgment will be a bar to any subsequent suit on the demands contained in the counts not named in the verdict.

It is further contended that there was a misjoinder of causes of action. If counsel were correct in this assignment of error we could not notice the point as no such objection was taken either by demurrer or answer. The count on which judgment was rendered is good after verdict and the judgment of the circuit court will be affirmed. The other judges concur.

FARRAR et al., Appellants, v. THE CITY OF ST. LOUIS et al.

Constitution: Local assessments. The power to pave the streets of the city of St. Louis, and to charge the costs of such improvements against the adjoining property, conferred by section 26, article 3, and section 18, article 6 of its charter, and the mode of its exercise prescribed by ordinance No. 12,041 of said city, are not in conflict with the provisions of the constitution of the State.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Glover & Shepley, John Wickham and J. L. and F. P. Blair for appellants.

The action was properly brought in the name of the appellants, as tax-payers of the city of St. Louis. Matthis v. Cameron, 62 Mo. 504; State v. Saline Co., 51 Mo. 350; Newmeyer v. Railroad Co., 51 Mo. 81. The city ordinance No. 12,041, attempts to collect a special tax for the improvement of Washington avenue from Fifth to Twelfth street, by dividing the entire cost of the work by linear front feet, and requiring each adjoining lot owner to pay accordingly; said ordinance is unconstitutional and void. Charter of St. Louis, § 18, art. 6; Cooley Con. Lim., (5 Ed.) top p. 629; Cooley Tax., p. 451; Burroughs Tax., p. 470; Warren v. Henley, 31 Iowa 31. The courts have never held the front foot rule, so called, to be a rule, nor have they admitted the legislature omnipotent. Burroughs on Tax., p. 61: Woodbridge v. Detroit, 8 Mich. 274; City v. Donohue, 31 Mo. 345; Weber v. Schergens, 59 Mo. 389; Halpin v. Campbell, 71 Mo. 493. The special tax proposed by ordinance 12,041 is unconstitutional and void, because not uniform. Cons. of 1875, art. 10, §§ 1, 3, 4, 6, 7, 10; City Charter 1876, art. 6; St. Joseph v. O'Donohue, 31 Mo. 345; Livinton v. Albany, 41 Ga. 21; Burroughs on Tax., p. 62. Ordinance 12,041 is illegal and void, because it exempts from the oper-

ation of the special tax a large part of the property liable to its burden. City of New Haven v. Fair Haven, etc., R. R. Co., 38 Conn. 422; Gas Co. v. Thurber, 2 R. I. 15. Said ordinance is illegal in taxing owners of adjoining lots for improving that part of the avenue in possession of the rail-City Charter, art. 10, § 5; 2 Dillon Munic. Corp., (3 Ed.) § 761; Street R. R. Co.'s Appeal, 32 Cal. 491. ordinance is illegal in taxing lot owners with cost of crosswalks. City Charter, art. 6, § 18; Blunt v. Janesville, 31 Wis. 648. The special tax proposed by the ordinance is void, because in excess of constitutional limit. Cons., art. 10, §§ 11, 8. The ordinance is illegal, being in violation of section 15, article 6 of the city charter, and because it establishes no constitutional improvement district. Cons., art. 5, §\$ 9, 10; State, etc., v. St. Louis, 1 Mo. App. 503; Cummings v. Bank, 101 U. S. 153. The contract of the city with W. R. Allen is void, because it contains a clause authorizing the street commissioners to alter its terms. City Charter, art. 6, §§ 15, 27, 28; Kiley v. Oppenheimer, 55 Mo. 374. The ordinance is void, because it is in conflict with the provisions of section 18, chapter 6 of the City Charter. Blunt v. City, 31 Wis. 648; Ruggles v. Collier, 43 Mo. 353.

George A. Madill and Leonard Wilcox for W. R. Allen.

The power to tax is inherent in the State, and primarily is unlimited. No restriction upon such power will be presumed to be imposed by the constitution, unless such intention is expressed in clear and unambiguous terms. County Ct. v. Griswold, 58 Mo. 192; Dillon Munic. Corp., (3 Ed.) § 737; Cooley Cons. Lim., § 479; Simmons v. State, 12 Mo. 270; Railroad Co. v. Maguire, 20 Wall. 46, 62; McCullough v. Maryland, 4 Wheat. 431. The Supreme Court of this State has always recognized the validity of local assessments to pay for local improvements, and held that the general provisions of the various constitutions of the State limiting and regulating the mode of taxation, were not in-

tended to reach them. Lockwood v. St. Louis, 24 Mo. 20; Newby v. Platte Co., 25 Mo. 269; Garret v. St. Louis, 25 Mo. 413; Palmyra v. Morton, 25 Mo. 595; Egyptian Lever Co. v. Hardin, 27 Mo. 496; St. Louis v. Clements, 36 Mo. 471; Uhrig v. St. Louis, 44 Mo. 463; State v. St. Louis, 62 Mo. 245; St. Louis v. Speck, 67 Mo. 406; Adams v. Lindell, 72 Mo. 198; St. Louis v. Spigel, 75 Mo. 146. The power granted the city of St. Louis to pave, is a continuing one. McCormack v. Patchen, 53 Mo. 36; Hoffman v. St. Louis, 15 Mo. 654. The power conferred on the city to pave at the cost of the adjoining property, carries with it the power to adopt any reasonable mode of apportionment. Cons. Lim., (5 Ed.) p. 233; Dillon Munic. Corp., (3 Ed.) §§ 94, 739, 741; Page v. St. Louis, 20 Mo. 142; Am. Union, etc. v. St. Joseph, 66 Mo. 680. The frontage assessment was Cooley Cons. Lim., 629; Cooley on Tax., p. 451; Fowler v. St. Joseph, 37 Mo. 228; St. Joseph v. Anthony, 30 Mo. 228; Neenan v. Smith, 50 Mo. 528; Adams v. Lindell, 72 Mo. 198. The mode of the exercise of the power to make the street improvements, prescribed by ordinance No. 12,041, was otherwise constitutional and valid.

Norton, J.—Section 26, article 3 of the charter of the city of St. Louis, (R. S., p. 1585,) provides that the mayor and assembly shall have power within the city, by ordinance, to establish, open, vacate, alter, widen, extend, pave all streets and avenues or otherwise improve and provide for the payment of the costs and expenses thereof in the manner provided in the charter. It is also provided by section 18, article 6, Revised Statutes, page 1608, that the cost of constructing such improvements in the city shall be apportioned as follows: "The grading of new streets, alleys and the making of crosswalks and repairs of all streets and highways and cleaning of the same, and alleys and crosswalks, shall be paid out of the general revenue of the city; and the paving, curbing, guttering, sidewalks and the materials for the roadways, the

repairs of all alleys and sidewalks, shall be charged on the adjoining property as a special tax and paid and collected as hereinafter provided, and whenever the estimated special taxes to be assessed against any property shall in the aggregate amount to more than 25 per cent of the assessed value of said property, calculating a depth to such property of 150 feet, then the assembly shall provide out of the general revenue fund for the payment of the amount in excess of said 25 per cent."

In pursuance of the power conferred by the charter provisions the following ordinance was adopted by the mayor and assembly.

[12,041]

"An ordinance to reconstruct Washington avenue, from Fifth street to Twelfth street."

"Be it ordained by the municipal assembly of the City of St. Louis, as follows:

"Section 1. The board of public improvements is hereby authorized and directed to cause Washington avenue, from Fifth street to Twelfth street, to be reconstructed by taking up and removing the old pavement, preparing the road-bed, renewing and re-adjusting the curbing, paving the roadways with granite blocks laid on a concrete foundation, and making all proper connections and intersections with other streets and alleys.

"Section 2. The foundation shall be a bed of hydraulic cement concrete; the paving blocks shall be granited laid on a bed of sand, and the curbing shall be limestone.

"Section 3. The old pavement shall be removed and the road-bed properly formed to a depth of fourteen inches below the intended surface of the roadway. On the roadbed a foundation of hydraulic cement concrete six inches deep shall be laid; on this foundation there shall be placed a pavement of granite blocks set on edge on a bed of clean, coarse sand. The blocks shall then be covered with fine, hot gravel and raked until the joints are completely filled. There shall then be poured into the joints of the pavement

a paving cement of proper consistency until they are filled flush with the surface. All broken or defective curbstones shall be removed and replaced with new ones, and such as can be used again shall be re-adjusted. They shall have a straight and even face on the side toward the gutter, and shall have close joints at least eleven inches in depth below top of earth.

"Section 4. The cost of the foregoing work and all proper connections and intersections required shall be charged as a lien upon the adjoining property fronting or bordering on the improvement herein provided for, and shall be paid by the owners thereof. When said work is completed, the president of the board of public improvements shall compute the cost thereof respectively in the proportion that the linear feet of each lot fronting or bordering on said improvement bears to the total number of linear feet of all the property chargeable with the special tax aforesaid and shall make out and certify to the comptroller, on behalf of the contractor, bills of such cost and assessment accordingly as required by law."

" Approved May 10, 1882."

That on the foot of said ordinance is the following entry.

Office of the Board of Public Improvements, St. Louis, April 14, 1882.

"The board of public improvements estimate the cost of the entire work to be done at the expense of the property-owners at \$42,840.

Attest: HENRY FLAD, president.

EMORY S. FOSTER, Secretary."

The plaintiffs, who are the owners of a lot of ground fronting thirty-two and one-half feet on Washington avenue on the line of the improvement authorized by the ordinance, with a depth of seventy-one feet along the west line of Ninth street, instituted this proceeding to enjoin the city and the contractor from executing the work of recon-

structing Washington avenue. They allege substantially in their petition as the grounds for appealing to the restraining and injunction powers of the court the following:

 That the ordinance and contract are beyond the powers of the city and are illegal and void.

2. That Washington avenue has heretofore been improved; that the city at large is interested in its improvement; that the ordinance makes no provision for ascertaining the benefits to the public from the improvement thereof; but assesses the whole cost thereof equally upon each linear foot fronting on said avenue between Fifth and Twelfth streets.

3. That said ordinance includes the cost of cross-walks on Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh streets, whereas under section 18, of article 6 of the charter, the same should be paid out of the general revenue of the city; and further, that the cost of paving squares formed by the intersecting streets crossing Washington avenue is charged against the property abutting on said avenue.

4. That the work required to be done and the materials to be furnished by said ordinance, constitute nothing but repairs of Washington avenue, and the same should be paid out of the general revenue of the city.

5. That the ordinance is invalid because no ordinance has been passed for the construction of cross-walks between Fifth and Twelfth streets on Washington avenue.

6. That the ordinance is illegal, because it does not provide for imposing a part of the cost of the work on the railroad companies occupying Washington avenue be between the points named.

7. That the ordinance is illegal and void, because it violates article 10 of the constitution of Missouri.

8. That the ordinance is illegal, because it directs the levy and collection of a special tax for a street improvement in an unconstitutional manner, and exempts from taxation property which ought to have been included within

the improvement district for the improvement of Washington avenue from Fifth street to Twelfth street.

9. That the ordinance is invalid, because it undertakes to levy an unequal or non-uniform tax on property within the territorial limits of St. Louis.

10. That the ordinance is illegal and unconstitutional, because under it plaintiffs are compelled to pay on their property worth \$13,000, the same amount as is charged other property, having the same frontage, worth \$100,000.

11. That the ordinance is illegal and void, because it exempts from taxation property not exempted by the constitution, in this, that the property before mentioned worth \$100,000 is taxed no more than plaintiff's property worth \$13,000; hence, \$87,000 in value of the first mentioned property escapes taxation.

To this petition the city interposed a demurrer, which the circuit court sustained, and plaintiffs declining to plead further, judgment was rendered for the defendants, which, on plaintiffs' appeal to the St. Louis court of appeals, was affirmed, and from this judgment of affirmance plaintiffs have prosecuted their appeal to this court.

The various grounds relied upon by plaintiffs for relief, as stated in the petition and above set forth, raise this question: Is it within the power of the city, under its charter and the constitution of the State, to reconstruct its streets and charge or assess the cost thereof against the property adjoining or fronting upon the improvements in the proportion that the linear feet front of each lot bears to the total number of linear feet of all the lots abutting on the street? An affirmative answer to this question affirms and a negative answer reverses the judgment.

The power to pave the streets of the city and to charge the cost of such improvements against the property adjoining such improvement, is directly conferred by section 26, article 2, and section 18, article 6, above referred to in this opinion, and the ordinance which plaintiffs assail passed in pursuance of that power, must be held to be valid, unless

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it be made clearly to appear that the power conferred and the mode of its exercise is in violation of some constitutional requirement or restriction. It is claimed by counsel for plaintiffs, in an ingenious and able argument, that said charter provisions, as well as the ordinance, are in violation of sections 1, 3, 4, 6, 7 and 11 of article 10 of the constitution on revenue and taxation. The sections are as follows:

Section 1. The taxing power may be exercised by the general assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the general assembly, for county and other pur-

poses.

Section 3. Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.

Section 4. All property subject to taxation shall be

taxed in proportion to its value.

Section 6 provides that certain property therein specified shall be exempt from taxation, and section 7 provides that all laws exempting property from taxation other than the property specified in section 6, shall be void. So much of section 11 as is relied on to sustain the point made by

plaintiffs, is as follows:

"Taxes for county, city, town and school purposes, may be levied on all subjects and objects of taxation. For city and town purposes the annual rate on property in cities and towns having 30,000 inhabitants, or more, shall not, in the aggregate, exceed one hundred cents on the \$100 valuation. * * Said restrictions, as to rates, shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing or bonds which may be issued in renewal of such indebtedness."

If, as contended for by plaintiffs' counsel, that the "taxes" and "taxation" referred to in the above sections,

embrace, and were intended to embrace, special assessments made to pay for local improvements, then it would follow that the said charter provisions of the city, as well the ordinance No. 12,041, the validity of which is questioned in this suit, would fall because of conflict with the constitution. But we are of the opinion that charges for the cost of a local improvement against the property benefited by the improvement, although an exercise of the taxing power, are not such taxes as are referred to in the various clauses of the constitution above quoted, and that they are neither embraced, nor intended to be embraced in them. Said article 10 of the constitution is devoted to "revenue and taxation," and the taxation there provided for and restricted relates to such taxation as is intended to raise revenue to be paid into the respective treasuries of the State, county or municipality, and to be disbursed therefrom for State, county or municipal purposes. At the time the constitution of 1875 was being framed, the validity of special assessments for the payment of the cost of local improvements had been sustained in numerous rulings of this court, the principle underlying these adjudications being that the property benefited by a local improvement was increased in value as much as it is required to pay for the improvement. These rulings were made under the constitutions of 1820 and 1865, both of which contained the same provision that is contained in said section 4 of the present constitution, viz.: "That all property subject to taxation, shall be taxed in proportion to its value." The point now under discussion being the pivotal one in the case, we deem it not inappropriate to refer to some of the cases bearing upon it.

In the case of Lockwood v. City of St. Louis, 24 Mo. 20, where, notwithstanding by the law then existing, church property was expressly exempted from State and county taxation, and where, by the charter of the city, the authority of the city to levy and collect taxes was confined and limited "to property made taxable by law," it was held that a special assessment against church property for its

proportion of the cost of constructing a sewer was justifiable, and that it was not a tax in the meaning of the law exempting church property from taxation for general purposes. It was observed in that case "that these special assessments are found in the English law, and have prevailed in most if not all the states, and their validity cannot be questioned under our constitution. Their intrinsic justice strikes every one. If an improvement is to be made, the benefit of which is local, it is but just that the property benefited should bear the burden. While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the benefit of the few." The case from 11 Johns. 77, in the matter of the Mayor of New York, is approvingly quoted, where, for improving Nassau street, several churches were included in the street assessment, and they claimed to be exempt from its operation, under the provisions of the state law, that "no real estate belonging to any church shall be taxed by any law of this state." The court held that this referred to general taxes to be assessed for the benefit of the town, county or state at large, that to pay for the opening of a street in proportion to the benefit derived from it, was no burden, and, therefore, no tax within the meaning of the law.

In the case of Newby v. Platte Co., 25 Mo. 269, where the constitutionality of the road law, which provides that in determining the just compensation to which the owner of property appropriated to public use is entitled under the constitution, the benefits and advantages accruing to such owner in respect to the residue of his property unappropriated in consequence of the use to which the part taken is applied shall be taken into consideration was drawn in question. Judge Leonard in an elaborate opinion in discussing the question of special assessments for local improvements observed "that the property is assessed in respect to the benefit derived from the improvement; it is a tax on the benefits rather than a tax on the property and therefore not obnoxious to the constitutional requirement

that all property subject to taxation shall be taxed according to its value. There is a marked difference between general taxation and special asssessments for local objects and the word tax may be used in a contract or statute so as not to embrace within its meaning local or special taxes, although both kinds of taxation derive their authority from the general taxing power."

So in the case of Garrett v. City of St. Louis, 25 Mo. 505, where, in speaking of assessments for benefits, it is said: "The tax in question is not such a property-tax as is within the meaning of that provision of the constitution requiring all property to be taxed according to its value. The tax is local, for local purposes and is a tax on benefits and not directly on property. The cost of the public benefit is made a public burden, and the expense of the individual benefit is placed upon the shoulders of the persons who receive it."

So in the case of the Egyptian Levee Company v. Hardin, 27 Mo. 495, where it was insisted that a provision of the charter which authorized the corporation to construct levees and dig canals, for the purpose of reclaiming from liability to overflow a district of country between the Des Moines, Fox and Mississippi rivers in Clark county, and which also authorized the fund necessary for such improvements to be raised by a tax not to exceed fifty cents per acre upon the landholders in the district embraced within the charter was obnoxious to the constitutional requirements that all property should be taxed according to its value, it was held "that the said provision of the constitution is applicable only to taxation in its usual ordinary, and received sense, to taxation for general, state, county, city and town purposes, not to local assessments where the money raised is expended on the property taxed." In the case of the City of St. Joseph v. Anthony, 30 Mo. 537, the constitutionality of a charter provision authorizing the city to macadamize streets within its limits, and to apportion and charge the cost thereof on the adjoining lots in pro-

portion to their front feet was upheld. Now, if, as is held in the above cases the words taxation and taxes as used in section 4 of the constitution were not intended to apply, and in fact did not apply to local or special assessments for local improvements, but relate only to general taxation for state, county, city and town purposes, we are justified, in the absence of any express or necessarily implied provision to the contrary, in concluding that the same words used in other sections as well as the restriction contained in section 11, as to annual rates of taxation, refer not to special assessments for local improvements but only to general or special taxation having for its object the raising of revenue to go into the respective state, county, city or town treasuries for disbursement therefrom for state, county, city or town purposes.

It was well known to the members of the convention who framed the constitution of 1875, that according to the rulings of this court the words "taxes" and "taxation" as used in sections of the constitutions of 1820 and 1865, identical with said section 4, did not embrace special assessments or taxes imposed to pay for local improvements for benefits thereby conferred on the property assessed or taxed; and if they intended to change the rule of interpretation in this respect, and embrace special assessments in the restrictions contained in said section 11, apt words expressive of such intention and accomplishing such object would donbtless have been used. No such words were used, nor are they necessarily implied from the expression contained in said section, that "said restriction as to rates shall apply to taxes of every kind and description," for in the case of Sheehan v. The Good Samaritan Hospital, 50 Mo. 155, where, by statute, the property of the hospital was expressly "exempt from taxation of every kind," it was held that the property was liable to a special assessment against it for the improvement of a street on its front, notwithstanding by statute it was exempt from taxation of "every kind," the court holding "that the taxation from

which it was exempted was for the ordinary taxes for the purpose of revenue, and that the tax-bill sued on is not regarded as a tax, but as an assessment for improvements, and is not considered a burden, but as an equivalent or compensation for the enhanced value which the property derives from the improvement."

In the case of Adams v. Lindell, 72 Mo. 198, this court approved the opinion of the St. Louis court of appeals in the same case, reported in 5 Mo. App., 197, where it was held that the provisions of the constitution of 1875 relating to uniformity and equality of taxation, as well as the restrictions contained in said section 11, were not intended to apply to and did not effect any change in the law as to the right of municipal corporations to make special assessments for local improvements.

In case of City of St. Louis v. Spiegel, 75 Mo., 145, it was held that said section 3, which provides that taxes shall be uniform throughout the territorial limits of the authority imposing the tax, did not apply to a tax on property. But conceding, for the argument, that the section as to uniformity of taxes applies to special assessments, we can not see that the rule prescribed has been broken in the case before us, inasmuch as all the property adjoining the improvements is not only assessed, but each front foot thereof is assessed alike.

It is insisted that the improvement of Washington avenue authorized by the ordinance only constitutes repairs, and that under the charter the cost for repairs cannot be charged against the adjoining property, but must be paid out of the general revenue fund of the city. We are of the opinion that the work to be performed under ordinance cannot be said to be repairs. It provides for the reconstructing Washington avenue, not by repairing it, but by taking up and removing the old pavement, preparing the roadbed, removing and re-adjusting the curbing, paving the roadway with granite laid on a concrete foundation, and making all proper connections and intersections with other streets.

The old pavement is to be taken up and removed and a new and different one to be put down. The power conferred upon the city to "pave and otherwise improve its streets" is a continuing one, and it was said in the case of McCormack v. Patchin, 53 Mo. 36, where the construction of the above words was invoked, that "the power to grade and improve streets is a legislative power, and is a continuing one unless there is some special restraint imposed in the charter of the corporation. It may be exercised from time to time as the wants of the corporation may require, and of the necessity and expediency of its exercise the governing body of the corporation and not the courts, is the judge. The power to compel property-owners to pave generally extends to the compelling them to repave when required by the municipal authorities." An inspection of the ordinance shows that the objection urged that it includes the costs of crosswalks is not well taken. Crosswalks are not mentioned in the ordinance and the phrase contained in it, "all proper connections and intersections with other streets" does not necessarily include crosswalks. The objection made, that the cost of paving the connections and intersections with cross streets cannot be charged against the lots, is answered by the case of Powell v. City of St. Joseph, 31 Mo. 347, where it was held that under the statute which authorized the city of St. Joseph to assess the cost of macadamizing, paving and repairing streets to the owners of adjoining property in proportion to their front on the streets, the cost of paving, etc., of the crossings should be assessed to the property owners of the adjoining blocks in proportion to their front.

It is also insisted that the ordinance is invalid because it does not impose a part of the cost of reconstruction on the railroad companies occupying with their tracks a part of Washington avenue. It is averred in the petition that the railroad companies operating roads on said avenue, are required by section 5, article 10 of the city charter, and by section 4, article 4 of the revised ordinances, whenever a

street is reconstructed, to reconstruct in like manner and with the same material, as the company is bound, by its charter, and the charter and ordinance of the city, to main-We have no doubt that under the charter of the railway company, (Laws 1864, p. 486,) and the charter and ordinance of the city, that the railway company is liable for the cost of reconstructing so much of Washington avenue as is included between the rails of the company's tracks. St. Louis v. Railroad Co., 50 Mo. 94. We do not, however, think it was necessary, to the validity of the ordinance, that the liability of the company should have been specified in it, inasmuch as its liability was fixed in another ordinance of the city of equal force with ordinance 12,041, and it is to be presumed that the officers charged with the execution of these ordinances would observe the requirements of both. But if in performing these duties the law is not observed. and the cost of the improvement between the rails of the company's tracks is assessed against the property fronting on the avenue, the most that could be said of it is, that the tax-bill would only be invalid to that extent, and that it would still be valid to the extent of the true amount for which the lot is liable. Neenen v. Smith, 60 Mo. 292; Bank v. Arnoldia, 63 Mo. 229.

It is also insisted that the requirement in the ordinance that the cost of reconstruction shall be assessed against the adjoining lots according to their frontage is invalid and operates unequally and unjustly. Having shown that the charter of the city confers upon it the power to pave and reconstruct its streets, and to assess the cost of the work on the adjoining property, without binding it to any method of apportioning the cost, but leaving the municipal authorities free to adopt any method not forbidden by the constitution or general laws of the State, it follows that they might adopt any method in apportioning the cost which the legislature could adopt. American Union Express Co. v. St. Joseph, 66 Mo. 680, 681. Dillon on Municipal Corporations, section 752, lays down the rule thus: "The courts

are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements, is a branch of the taxing power, or included within it, and the many cases which have been decided, fully establish the general proposition that a charter or statute authorizing the municipal authorities to open or establish streets, or to make local improvements of the character above mentioned, and to assess the expense upon the property which, in the opinion of the designated tribunal or officers, shall be specifically benefitted by the improvement in proportion to the amount of such benefit, or upon the abutters in proportion to benefits, or frontage or superficial contents, is, in the absence of some constitutional restriction, a valid exercise of the taxing power."

The method adopted in the ordinance of charging the cost of reconstructing Washington avenue against the adjoining lots, according to their frontage, has been repeatedly authorized by the legislature of the State by express statute, and such enactments have been upheld and received the sanction of the court in the following cases: Palmyra r. Morton, 25 Mo. 594; St. Joseph v. Anthony, 30 Mo. 538; Fowler v. St. Joseph, 37 Mo. 228; Powell v. St. Joseph, 31 Mo. 347; City of St. Joseph v. O'Donoghue, 31 Mo. 345; St. Louis v. Clemens, 49 Mo. 554; Neenen v. Smith, 50 Mo. 528; Kiley v. Cranor, 51 Mo. 541; Weber v. Schergens, 59 Mo. 390; St. Louis v. Allen, 53 Mo. 44. The liability of lots fronting on a street, the paving of which is authorized to be charged with the cost of the work according to their frontage, having been thus so repeatedly asserted, the question is no longer an open one in this State, and we are relieved from the necessity of examining authorities cited by counsel for plaintiff, condemning what is familiarly known as the "front foot rule." While irregularities arising in the enforcement of the rule in consequence of irregularities in the situation and depth of lots, may afford a reason for an appeal to the legislative power of the State for their

rectification, they would not justify the courts in invading the domain of the legislature.

In the case of the Egyptian Levce Co. v. Hardin, supra, where the legislature authorized an assessment of fifty cents per acre on all land embraced within a certain district, to pay the cost of leveeing and ditching to prevent overflow, it was claimed that the rule laid down worked unequally and unjustly, inasmuch as some of the land in the district was worth \$75 per acre, and other land only \$20. It was observed, in disposing of the point made, "that in every form of taxation, whether local or general, it is desirable that the burden should be distributed, as near as may be, in proportion to the benefit derived. But where there is an absence of constitutional provisions, it is not in the power of the courts to enforce any fancied scheme of equality seeming to them more just than the one adopted by the legislature. The latter department of the government is wisely intrusted with the entire control of this subject, and if practical injustice is done, the remedy is with the people." The same principle is announced in the case of Garrett v. City of St. Louis, 25 Mo. 505, where the question of assessments for benefits was involved, and it was said "the question is not whether individual instances of injustice may not occur. It is not whether the tax will produce perfect equality of burdens, nor whether the power may not be abused. We know too well that under any system of taxation these things may and do happen. They are evils not within the power of the courts to remedy. It is for the legislature to guard against them." The case of City of St. Joseph v. O Donoghue, supra, is to the same effect.

It follows from what has been said, that the question stated in the beginning of this opinion must be answered in the affirmative, and this necessarily leads to an affirmation of the judgment of the court of appeals, and it is hereby affirmed, with the concurrence of all the judges.

Hunt et al. v. Marsh et al., Appellants.

- Covenant against Incumbrances: WHEN RIGHT OF ACTION ACCRUES. No right of action accrues on a covenant against incumbrances in favor of the vendee of land, until he suffers an ouster or has been compelled to extinguish the incumbrances to save his estate.
- 2. Vendor's Lien: WAIVER. The acceptance by the vendor of other personal security than the note or obligation of the vendee, is only prima facie evidence of his intention to waive his vendor's lien, and may be rebutted by facts and circumstances which take from the act its prima facie import.
- 3. ——: FACTS WHICH REBUT PRESUMPTION OF WAIVER. Where it appeared that the vendor sold the land in the first instance to M, that the deed, at the latter's request, was made to his wife and son, that M paid part of the purchase money, that he delivered the note with his name on it for the balance; paid part of this note and entered into the possession of the land and still holds the possession thereof, Held, these facts divest the note of its independent and collateral character, and rebut the presumption of an intention on the part of the vendor by its acceptance, to waive the lien.

Appeal from Jackson Special Law and Equity Court.—Hon. R. E. Cowan, Judge.

AFFIRMED.

C. O. Tichenor for appellant.

The covenant against incumbrances was broken when plaintiffs executed the deed. Williamson v. Hall, 62 Mo. 405; Kellogg v. Malin, 50 Mo. 496. The dower interest outstanding when plaintiffs executed the deed, in the widow of their grantor, was an incumbrance. Darrett v. Peper, 58 Mo. 551. It is true the dower interest has not been satisfied by defendants, yet the land is lessened in value to the extent of the incumbrance, which is not a personal claim on plaintiffs; their liability is measured by these covenants, which are broken, and when the damage is paid, there can be no further liability. The taking of the note sued upon,

bearing the same date as the deed, is a waiver of the lien, at least in absence of evidence on part of vendors, to show that they had a different intent. Durette v. Briggs, 47 Mo. 362, and cases cited.

W. E. Sheffield for respondent.

The demurrer to the second defense was properly sustained, as defendants could not set it up while they retained possession of the premises. 15 Mo. 387; 17 Mo. 332. The acceptance of the note signed by Wm. N. Marsh, was, under the circumstances of this case, no waiver of the vendor's lien. 52 Mo. 96; 68 Mo. 198.

Martin, C.—This was a suit in equity to enforce a vendor's lien against certain real estate near Kansas City, and to obtain judgment on the note which was given for the purchase money for which the lien was claimed. Ellen L. Hunt, the wife of Robert H. Hunt, was owner of the land, and alleges in her petition that on the 15th day of April, 1875, she sold the land in controversy to William N. Marsh, defendant; that at the request of said William N. Marsh, she, joining with her husband, made conveyance of the land in question to A. Marsh and Fennimore C. Marsh, defendants, who were the wife and son of said William N., for the consideration of \$1,309.88; that said William N. paid down the sum of \$436.63, leaving a balance of \$873.35 unpaid, for which he delivered to plaintiff a promissory note in the amount thereof payable to her, signed by said A. Marsh, F. C. Marsh and by said William N., who added to his signature the word "security;" that said William N. paid two installments of interest on the note, leaving the principal thereof still due with interest; that after the purchase said William N. entered into possession of the premises so conveyed, and is still in the possession thereof; that said Ellen L. Hunt is entitled to a vendor's lien for the purchase money so remaining unpaid, and, therefore, asks for

a judgment on the note and a decree enforcing it against the land.

The answer purports to set forth two defenses. In one it is alleged that the deed of conveyance contained covenants of warranty and against incumbrances, which had been broken by the existence of a right of dower still outstanding; that the dower right is worth \$800; that the vendees have been damaged in said sum by reason of the breach of covenants aforesaid, which they asked to be allowed against the note sued on.

In the other defense it is alleged that the right to a lien was waived by Mrs. Hunt, when she accepted a note for the purchase money, signed by said Wm. N. Marsh, as mentioned in the petition.

On motion of plaintiffs, the defense relating to the lien was stricken out. The plaintiffs demurred to the other defense relating to breach of covenants, and the court sustained the demurrer. This action of the court left the defendants without any defense to the suit, and judgment was rendered according to the prayer of the petition, from which they have appealed.

The court did not err in sustaining the demurrer to the defense on the covenants. It failed to state an eviction either actual or constructive. It also failed to state a payment of the dower or other extinguishment of the dower right. It has long been settled that these covenants run with the land and inure to the owner who suffers ouster or who is compelled to extinguish the incumbrance to save his estate. No substantial injury happens before this, and no right of action accrues before. Dickson v. Desire, 23 Mo. 151; Ward v. Ashbrook, 78 Mo. 515; Jones v. Whitsett, 79 Mo. 188. The vendees being in possession of the land purchased by them, can make no such defense against a suit on the notes for the purchase money. Pershing v. Canfield, 70 Mo. 140; Cartwright v. Culver, 74 Mo. 179.

The action of the court in striking out the defense relating to a waiver of the lien claimed by plaintiff, affords

no good reason for reversing the judgment. The vendor impliedly retains a lien for unpaid purchase money, in the absence of an express waiver of it by contract, or the performance of some act which is regarded as equivalent to an agreement to waive it. The acceptance of other personal security than the note or obligation of the vendee has always been regarded as an act indicating an intention to waive the lien. Carr v. Thompson, 67 Mo, 472; Stevens v. Rainwater, 4 Mo. App. 292; Durette v. Briggs, 47 Mo. 362. The taking of such security is only prima facie evidence of the intention to waive, and may be rebutted by facts and circumstances, which in their nature take from the act its prima facie import, leaving the implied and primary intention to retain the lien unaffected by the act. Pratt v. Eaton, 65 Mo. 157. If Wm. N. Marsh had been an utter stranger to the purchase of this land, his name on the note given by the vendees, would have had the full force and effect of giving to it the character of an independent security, which supports the intention of waiving the vendor's lien. But it is alleged in the petition that Mrs. Hunt sold the land in the first instance to Wm. N. Marsh, and that the deed was, at his request, made to his wife and son; that Wm. N. Marsh paid down a part of the purchase money; that he delivered the note with his name on it for the balance; that he paid a part of this note; that he entered into possession of the land and still holds the possession thereof. These facts, if proved or admitted, divest the security taken by Mrs. Hunt of its supposed independent and collateral char-So far as Mrs. Hunt is concerned, Mr. Wm. N. acter. Marsh must be regarded in equity as the real purchaser. She had no dealings with any one else except at his instance and request. Therefore, in accepting a note for the purchase money with his name on it, no inference of waiving the lien arises. She did only what she might naturally be expected to do from the character of the transaction and the relation which he occupied to her and the land.

In the case of Davenport v. Murray, 68 Mo. 198, the

vendor sold to the husband, but at his request made the deed to his wife, who was the sole vendee according to the record. The note for the purchase money was signed by the husband as well as the wife. It was held that the note did not imply waiver of the vendor's lien material difference between the facts of that case and the one we have under consideration, is, that in the present case the deed was, at the request of the husband, made to the wife and son, instead of the wife alone. There was no denial of the foregoing facts in the defense which was stricken out. Neither is there a proper traverse of the facts in any other part of the answer. There is a counter averment bearing argumentatively upon one of the facts pleaded in the petition. Defendants admit "that plaintiffs sold the land described in the petition, and for the price therein stated, but say that the same was sold to A. Marsh and Fennimore C. Marsh alone." This was an improper traverse of the facts as alleged in the petition, viz., that the land was sold to Wm. N. Marsh, and that at the request of said Marsh it was conveyed to A. Marsh and Fennimore C. Marsh, his wife and son. The plaintiffs were entitled to a traverse of these facts, which the answer does not contain. Neither is there any denial of the payment in part of the purchase money by Mr. Marsh, the delivery of his note as alleged. and the possession of the land by Mr. Marsh for himself.

We think the judgment was proper, and concur in affirming it.

Dusky, Appellant, v. Rudder.

Conversion: BAILER: AGENT: NOTICE. A bailee or agent of another, who, after being apprised of the rights of the real owner, retains possession of property, or of the proceeds of its sale, and refuses to deliver the same to such owner, is guilty of conversion. And it matters not, in this regard, that it was difficult to distinguish the property converted by the bailee from other property, which he had in his possession, and with which that converted was intermingled.

Appeal from Linn Circuit Court.—Hon. G. D. Burgess, Judge.

REVERSED.

This was an action instituted before ajustice of the peace for the conversion of twelve sheep and their increase, and also for the conversion of twelve fleeces of wool. The trial in the circuit court resulted in a verdict and judgment for the defendant.

The evidence, on the part of the plaintiff, tended to show that about January 10th, 1880, A.V. Dusky took away from plaintiff's farm, where prior thereto they were keeping their sheep together, fifty-five sheep, of which number plaintiff claimed twelve to be his property; that plaintiff was absent from home at the time, but that his son objected to A. V. Dusky taking more than thirty-six sheep having the latter's mark thereon, without plaintiff's consent; that within two or three days after the sheep were taken, plaintiff went to see A.V. Dusky, and found that the marks on the most of the sheep had been changed; that prior to this, on September 24th, 1879, A.V. Dusky had executed a chattel mortgage to one Barnes on 150 sheep, to secure the payment of a note for \$250; that Barnes was informed by plaintiff, at the time of the execution of the mortgage, that A. V. Dusky did not own the third of 150 sheep. The evidence of plaintiff further tended to show that the note and mortgage were placed by Barnes in the hands of defendant, the former having removed from the State; that on or about April 1st, 1880, on Sunday, plaintiff told Rudder, the defendant, that twelve of the sheep that A. V. Dusky took and their increase, belonged to him, plaintiff; that defendant refused to recognize said notice, because given on Sunday, and thereupon, on the following day plaintiff sent him a written notice of his claim to the sheep in controversy. Plaintiff's eviden e further went to show that A.V. Dusky

contracted to sell the fleeces of wool taken from the sheep in question to a purchaser at Chillicothe, Missouri, and that defendant, after receiving the above notices, hauled and delivered the wool there and received the money for it; that about July 1st, 1880, A. V. Dusky contracted to sell fifty odd sheep and thirty-five lambs (including the sheep in question) to one Watterson, at the price of \$125, the latter testifying that he bought the sheep of A.V. Dusky, but paid defendant \$52.10, he so paying that sum to defendant to have the Barnes mortgage released; that he, Watterson, bought all the sheep that were at defendant's. Plaintiff's evidence also went to show that these sheep so bought by Watterson, were put into defendant's possession at the instance of A. V. Dusky and one Stanley; that defendant offered to sell the latter forty-four of the sheep, and to take the risk arising from the ownership of some of the sheep being in dispute: that after defendant so obtained possession of the sheep he refused permission to plaintiff's son to go into the pasture to see the sheep, and notified plaintiff that there was only one way by which he could get the sheep, and that was by law. With respect to the money received by defendant for the wool and sheep claimed by plaintiff, the latter's evidence was, that defendant said he had the money and that plaintiff could not get it; the defendant himself testified that he told plaintiff that he, defendant, had \$91.50, that he got it from one Stodard, and was going to keep it until this matter was settled.

Defendant's evidence tended to show statements of plaintiff to one Darling that none of the sheep taken by A. V. Dusky belonged to plaintiff; that A. V. Dusky sold the wool at Chillicothe, and that he requested defendant to haul it there for him, which the latter did; that defendant there received the remainder of the purchase money due on it, brought it back, and at A. V. Dusky's request, he sent it to Barnes to apply on the mortgage debt; that he, defendant, did not know anything about the ownership of the wool; that the sheep were not in his possession until long

after the above; that all defendant's connection with the sale of the sheep was that A. V. Dusky and one Stanley came with them to defendant's and asked permission to turn them into the latter's field, which was granted; that A. V. Dusky then sold all the sheep to Watterson for \$125. the defendant only requiring that Watterson should pay the remainder due on the Barnes mortgage, \$52.10, before he would release it; that it was admitted that all the sheep were included in the mortgage, except from six to twelve; that the number admitted to be included in the mortgage was sufficient to pay the residue due on the mortgage twice over: that defendant simply got this balance for Barnes and not for his own benefit. Defendant's evidence also tended to thow that A. V. Dusky did not take away from plaintiff's any sheep except those having the former's mark; that he so took away fifty-one head.

Plaintiff asked the court to instruct the jury as follows:

- 1. If the jury believe from the evidence that on or about the 10th day of January, 1880, one A. V. Dusky, without the consent of the plaintiff, took and drove away from the plaintiff's farm and premises the sheep, or some number of them, claimed by him in his complaint in this case, and that afterward said sheep were taken to the farm of the defendant by said A. V. Dusky, and that he sold said sheep to one Gabriel Watterson without plaintiff's consent, and that of the money paid by said Watterson for said sheep the defendant received the sum of \$52.10, and that prior to the said sale of said sheep defendant had actual notice that plaintiff claimed to own a part of said sheep; and that the plaintiff was the owner of twelve or some other number of said sheep, then the jury should find their verdict for the plaintiff on the first count of the complaint, and assess his damages on said count at the value of plaintiff's sheep so sold.
- The court further instructs the jury that if they believe from the evidence that the plaintiff was the owner

Dusky had taken from plaintiff's farm and premises without his consent, on or about the 10th of January, 1880, and that said A. V. Dusky sold the fleeces taken off of plaintiff's said sheep, and that the defendant delivered said fleeces to the purchaser thereof, and received the payment therefor, and by an arrangement between said A. V. Dusky and defendant, he, said defendant, retained said money, and has not paid the same to plaintiff, and that defendant knew that plaintiff claimed to be the owner of the sheep, off of which said fleeces were taken, and also claimed the money derived from the sale thereof, then the jury should find for the plaintiff on the second count of the complaint, and assess his damages on said count at the value of said fleeces.

If the jury believe from the evidence that the sheep or any of them claimed by plaintiff in his complaint in this case, were the property of the plaintiff, and that while the plaintiff was such owner A. V. Dusky executed to one Barnes a mortgage upon the same, and that said A. V. Dusky, without plaintiff's consent, took and carried away said sheep from plaintiff's farm, and that afterward said A. V. Dusky sold said sheep to one Watterson, without plaintiff's consent, and that defendant being fully notified of plaintiff's claim of ownership to said sheep, and acting as agent for said Barnes for the collection of the debt mentioned in said mortgage and holding said mortgage, received from said Watterson the sum of \$52.10 on the payment for said sheep, and that defendant has refused to pay plaintiff anything for or on account of said sheep, then the jury should find their verdict for the plaintiff on the first count of the complaint.

The court refused to give the foregoing instructions as asked by plaintiff, but did give number one and two in a modified form. By the modification so made by the court as to number one, the plaintiff was not authorized to recover, unless the defendant (instead of A. V. Dusky) sold the sheep to Watterson, and by the modification as to num-

ber two, the plaintiff was not entitled to recover for the fleeces of wool sold, unless A. V. Dusky and defendant (instead of the former alone) so sold the said fleeces, as stated in the instruction. To the instructions so modified and given, the plaintiff objected and excepted.

The following were the instructions given at defend-

ant's request and against plaintiff's objection:

1. The jury are instructed that if the sheep claimed by plaintiff were brought to the defendant's premises by one A. V. Dusky, who claimed to be the owner thereof, with a flock of forty or more other sheep, also claimed by said A. V. Dusky, and that the plaintiff simply claimed so many sheep out of the flock, without, in any way, identifying, or offering to identify the particular sheep claimed by him, or to distinguish them from the other sheep in the flock, and that the sheep were sold by A. V. Dusky, and that the defendant had no part in such sale, but simply received out of the proceeds of the entire sale a sum sufflcient to satisfy and pay off a chattel mortgage on such of the sheep as were the property of A. V. Dusky, then the plaintiff cannot recover upon the first count, even though some of the sheep may have been plaintiff's property, and though he may have given defendant notice not to sell the sheep.

2. The jury are instructed that if the wool for which plaintiff claims in the second count, was sold by A.V. Dusky, and that the defendant had nothing to do with said sale, and only hauled said wool or fleeces with others to the market to accommodate the said A.V. Dusky, and that the defendant did nothing more in reference to such sale, except under the directions of said A.V. Dusky, to apply part of the proceeds on a note secured by chattel mortgage upon part of said sheep, then the plaintiff cannot recover upon the second count in the petition, unless he knew at the time, or before the sale of said fleeces, that the same or

some part thereof was the property of plaintiff.

Plaintiff's motion for a new trial assigned the following reasons therefor:

- 1. Because the verdict is against the weight of the evidence.
- 2. Because the court, in giving the instructions on the part of the defendant, to-wit, numbers one and two, committed error.
- 3. Because instructions one and two, given on the part of the defendant, were not warranted by the evidence adduced upon the trial of the issues.
 - 4. Because the verdict is contrary to the law.
- Because the court committed error in refusing instruction number three on the part of the plaintiff.
- 6. Because the instructions on the part of the plaintiff and defendant, as a whole, do not agree, nor correctly present the law of the case.
- A. W. Mullins for appellant, cited Koch v. Branch, 44 Mo. 542; Williams v. Wall, 60 Mo. 318; Schroeppel v. Corning, 5 Den. 236; Hoffman v. Carow, 22 Wend. 285; Stephens v. Elwall, 4 Maule & Sel. 259; Lyle v. Lindsey, 5 B. Mon. 123; 2 Hilliard on Torts, pp. 104, 105; also Ib., pp. 477, 478; Cooley on Torts, pp. 53, 54.
- S. P. Huston for respondent, cited Brady v. Conolly, 52 Mo. 19; McCoy v. Farmer, 65 Mo. 247; Acock v. Acock, 57 Mo. 154.

Sherwood, J.—This is an action instituted before a justice of the peace, R. W. Mitchell, of Jefferson township, Linn county. The plaintiff's statement is as follows:

Plaintiff states that the defendant owes plaintiff the sum of \$60, now due, for the value of twelve head of grown sheep and —— lambs, the increase of said sheep, which were sold and delivered by defendant and one A. V. Dusky, to one Gabriel Watterson, without the authority and against the will of plaintiff, heretofore, to-wit, on the — day of ——, 1880, and the proceeds of said sale for said sheep were

received by defendant and converted and appropriated to his own use and benefit. That said sheep, when so sold and delivered, were the property of the plaintiff. Wherefore plaintiff prays judgment for said sum of \$60, with interest and cost of suit.

And plaintiff further states that defendant owes plaintiff the sum of \$25.60 for and on account of said amount of money received by defendant for twelve fleeces of wool, which said wool was the property of plaintiff, and which was sold by defendant and one A. V. Dusky, to one A. Wallbrunn, heretofore, to-wit, on the — day of ——, 1880, and which said money has been converted and appropriated to defendant's own use and benefit. Wherefore plaintiff prays judgment for said sum of twenty-five dollars and sixty cents and for interest and costs.

The controlling question in this record is whether a conversion of plaintiff's sheep or their wool, or the proceeds of either took place as charged in the complaint. If the evidence establishes that a conversion of plaintiff's property occurred in either of these ways, and that the defendant in any manner aided in such conversion, the law holds him chargeable therewith and responsible therefor. a mere bailee, whether common carrier or otherwise, may receive property from one not rightfully entitled to possession and may deliver it in pursuance of the bailment, if this is done before notice of the rights of the real owner. After such notice he acts at his peril. Cooley on Torts, 456. And the evidence tends to show notice to the defendant, and a conversion by him of the property of the plaintiff and of its proceeds. Any wrongful act which negatives or is inconsistent with the plaintiff's right is per se a conversion. Koch v. Branch, 44 Mo. 542; Williams v. Wall, 60 Mo. 318; State v. Berning, 74 Mo. 87.

In Koch v. Branch, supra, an agent who collected money on a stolen voucher for an innocent purchaser thereof, was held liable for its value to the true owner, and that in order to such liability it was not necessary that the agent

should use the proceeds of the conversion to his own benefit. In the case just cited, that of Hoffman v. Carow, 22 Wend. 285, is approvingly mentioned, where an auctioneer was held liable to the owner of stolen goods, although such auctioneer sold them in the usual course of trade, without knowledge of the felony or the claim of the owner, and paid the proceeds to the person for whom the sale was made. In this case, as there was evidence of other acts of the defendant showing a conversion of the sheep and their proceeds, etc., it was quite immaterial whether he actually sold the sheep or their fleeces or not. For this reason the instructions asked by plaintiff numbered one and two should have been given without any modification, and the fact that A. V. Dusky had mortgaged the sheep in question along with others of his own, without the plaintiff's consent, and that defendant was acting as the mortgagee's agent in retaining possession of the sheep and in receiving the money to a sufficient amount to pay off and discharge the mortgage could not better his condition or make him less liable to an action. For this reason instruction number three asked by plaintiff should have been given. This instruction virtually told the jury that the mortgage of the sheep to Barnes was no protection to the defendant : nor was it, nor should it have been admitted in evidence since it was wholly foreign to the issues in the case.

It is true that the error of admitting in evidence the Barnes mortgage was not called to the attention of the court in the motion for new trial, but the discussion of the mortgage has become necessary owing to its being referred to in plaintiff's third instruction as well as in defendant's first instruction. And if the instructions asked by plaintiff should have been given without modification, it results therefrom that defendant's instructions should have been refused. Defendant's acts in retaining possession of the mortgaged property as the agent of Barnes after being apprised of plaintiff's rights, and after such notification thereof, retaining the proceeds of the sale and refusing to de-

liver to plaintiff any portion thereof, was clearly a conversion, and this, regardless of what the motive of the defendant may have been. If Barnes had taken possession of plaintiff's sheep by virtue of his mortgage he would have been answerable to plaintiff, and his agent cannot occupy any better position. Nor does it matter as affecting the question of defendant's liability, that it was difficult to distinguish plaintiff's sheep from the others in the flock, and this is especially true, if as the evidence tended to show, the marks of plaintiff's sheep had been changed by A. V. Dusky. Cooley on Torts, 53, 54.

Therefore judgment reversed and cause remanded.
All concur.

WILLIAMS, Plaintiff in Error, v. PAYNE.

Special Tax Bills: CIRCUIT COURT, JURISDICTION. Under the constitution of 1865, article 6, section 13, and Wagner's Statutes, (p. 430, § 2,) the circuit court of Jackson county had no jurisdiction of a suit to enforce the lien of a special tax bill for a less sum than \$50.

Error to Jackson Circuit Court.—Hon. S. H. Woodson, Judge.

AFFIRMED.

C. J. Bower for plaintiff in error.

The circuit court had jurisdiction of the suit to enforce the lien of the special tax bill, although the latter was for a less sum than \$50. Cranston v. Union Trust Co., 75 Mo. 29; Hunt v. Hopkins, 66 Mo. 98; Smith v. Clark Co., 54 Mo. 58; Fickle v. Railroad Co., 54 Mo. 225.

. 40. ..

Tichenor, Warner & Dean for defendant in error.

The circuit court had no jurisdiction to enforce the special tax bill. Fickle v. Railroad Co., 54 Mo. 219; Stamps v. Bridwell, 57 Mo. 22; Hunt v. Hopkins, 66 Mo. 98; Acts 1872, p. 411.

RAY, J.—This is an action of ejectment, for the north one-half of lot No. 82, in Swope's addition to Kansas City. The petition is in the usual form: the answer is a general denial.

The plaintiff, as shown by the record, claims title under a sheriff's deed, made under a special execution and judgment of the Jackson circuit court, in a suit commenced in said court to enforce against said lot the lien of a special tax bill, for the sum of \$27.96, issued by said Kansas City, under its charter, for grading its streets and sidewalks. Sess. Acts 1872, pp. 410, 411. The suit to enforce said tax bill was commenced in the Jackson circuit court on May 18th, 1874. Christie A. Tolbert, and her husband, Sylvester Tolbert, were made defendants, as the owners of said lot, and being non-residents of the State, were brought in by publication, and making no appearance, a special judgment by default was rendered, that plaintiff recover the amount of said tax bill, to be levied of the lot in question.

At execution sale, under this judgment, the present plaintiff became the purchaser, and brings this suit to recover the lot so bought, against this defendant, who is the tenant of the said Tolberts. A jury being waived, the court tried the cause, and at the instance of the defendant, gave a declaration of law, to the effect that the Jackson circuit court had no jurisdiction to entertain a suit commenced in said court, to enforce the lien of a special tax bill for the sum in question, or for less than \$50, and thereupon found the issues for the defendant, from which the plaintiff has appealed to this court. The only question,

therefore, is, whether this ruling of the circuit court is correct.

The charter of Kansas City, Sess. Acts 1872, p. 410, 411, provides for the issuance of such special tax bills as the one in suit, and authorizes its collection by suit, "in any court of competent jurisdiction," in the name of the contractor or his assignee. The charter also provides that if the owner of the lot be a non-resident of the State, he may be sued and brought in by an order or notice against him published, as in ordinary suits, to enforce a lien against land. The charter further provides that in a suit on any tax bill, the judgment shall be special, and that the plaintiff recover the amount of said tax bill, to be levied of the lot charged with the lien.

The charter then further provides that: "When the amount due on any tax bill does not exceed \$300, suit may be brought thereon before the recorder of the city, or any justice of the peace in said city, as in other civil cases," etc.

The above are all the material provisions of the charter bearing on the question at issue. The constitution provides that: "The circuit court shall have jurisdiction over all criminal cases which shall not be otherwise provided for by law, and exclusive original jurisdiction in all civil cases which shall not be cognizable before justices of the peace, until otherwise directed by the general assembly." Const. of 1865, § 13, art. 6; 1 Wag. Stat., p. 54. The statute in regard to circuit courts, then in force, declares that they shall have power and jurisdiction, as follows:

"First, as courts of law, in all criminal cases, which shall not be otherwise provided for.

"Second, exclusive original jurisdiction in all civil cases which shall not be cognizable before the county courts and justices of the peace, and not otherwise provided for by law

"Third, concurrent original jurisdiction with justices of the peace, in all actions founded on contract, when the debt or balance due, or damages claimed, exclusive of interest, shall exceed \$50, and not exceed \$90; in all actions

on bonds and notes for the payment of any sum of money exceeding \$50, exclusive of interest, and not exceeding \$150; and in all actions for injuries to the person, or personal or real property, wherein the damages claimed shall exceed \$20, and not exceed \$50." 1 Wag. Stat., p. 430, § 2.

In the case of Stamps v. Bridwell, 57 Mo. 22, 23, this court had occasion to construe these provisions of the constitution and statutes, in connection with section 1 of "An act to extend the jurisdiction of justices of the peace in certain counties, so as to embrace suits on mechanics' liens,"

approved March 30, 1872. Sess. Acts 1872, p. 44.

That section provides that "in all counties having over 100,000 permanent inhabitants, justices of the peace shall have jurisdiction in all actions brought to enforce mechanics' liens as provided by chapter 195 of the General Statutes of Missouri, when the amount or balance claimed to be due does not exceed \$300; and in every county having less than 100,000 permanent inhabitants, justices of the peace shall have such jurisdiction where the amount or balance claimed to be due does not exceed \$90.00; and every person entitled to such lien, may hereafter, after having complied with the provisions of said chapter 195, and after having filed his account and statement as prescribed by section five of said chapter institute his action therefor as above provided."

In passing upon that case, Stamps v. Bridwell, supra, which was a suit in the circuit court of St. Louis county, to enforce a mechanic's lien for the sum of \$41.60, this court uses this language: "These provisions of the constitution and statutes show that the circuit courts have no original jurisdiction to try cases cognizable before justices of the peace, except where provision is made for a concurrent jurisdiction and this is not one of them." Prior to the act of March 30, 1872, supra, the circuit courts had exclusive original jurisdiction over all suits to enforce mechanics' liens. That act made suits of that sort, under certain sums cognizable before justices of the peace with-

out any provision therein for concurrent jurisdiction. effect as we have seen, under a proper construction of these several constitutional and statutory provisions, was to exclude the suits thus made cognizable before justices of the peace, from the original jurisdiction of the circuit courts. So in the case at bar, upon the same principle, the original jurisdiction of the circuit court over suits to enforce the lien of these special tax bills thus made cognizable before justices of the peace by the charter of Kansas City, must be held to be excluded. Like the act of March the 30, 1872, concerning mechanics' liens, the Kansas City charter, without more, makes suits to enforce these special tax bills, cognizable before justices of the peace when the amount does not exceed \$300. The suit in this case, upon which the plaintiff's title to the lot in question depends, was as we have seen for an amount thus cognizable before justices of the peace, and over which, according to the authorities the circuit court of Jackson county had no jurisdiction; and it must, therefore, be held that its judgment was void, and that the proceedings and sheriff's deed thereunder, to the plaintiff, gave him no title to the lot thus sold.

In the case of *Hunt v. Hopkins*, 66 Mo. 98, which was a suit in the special law and equity court of Jackson county to enforce the lien of several special tax bills, under the same charter of Kansas City, the court virtually recognize the same doctrine, and impliedly holds that the court has no jurisdiction, under said charter, of suits for a sum less than \$50. The cases of *Smith v. Clark Co.*, 54 Mo. 58, and *Fickle v. St. Louis, K. C. & N. R'y Co.*, 54 Mo. 219, are in harmony with the same doctrine.

The case of Cranston v. Union Trust Co., 75 Mo. 29, to which we have been cited, as holding a different doctrine, is not in point. That was a case of a suit in the circuit court of Monroe county, to enforce a lien against the railroad of defendant for work done on its road-bed, amounting in value to the sum of \$22.43, and it was there held, and we think justly, that the circuit court had exclusive juris-

diction of such suits; and the reason assigned therefor was that no jurisdiction had ever been conferred upon justices of the peace to enforce liens against railroads, as had been done in the case of ordinary mechanics' liens. This case, therefore, is no authority against the doctrine of the other cases, and rests upon reasons peculiar to itself. The fact that the defendants in the suit to enforce the tax bill, upon which plaintiff's title rests, were non-residents, and were brought in by publication, as provided by the charter, cuts no figure and has no bearing on the question of the jurisdiction of the Jackson circuit court in that case. The fact that the imposition of a tax, technically considered, may not arise out of contract or ex delicto, is not important in this case.

There is, therefore, no error in this record, and the judgment of the circuit court is affirmed. All concur.

McLean, Appellant, v. Bergner.

- Administrator: FINAL SETTLEMENT, WHEN VACATED. The final settlement of an administrator has the force and effect of a judgment, and can be vacated only for fraud or mistake.
- 2. Final Settlement: NOTICE OF IN ENGLISH-GERMAN PAPER. A notice of final settlement of an administrator is sufficient when published in the English language, and on the English side of a newspaper published and printed in both the English and German languages, one side of the paper being German and the other English.
- 3. Fraud: PROOF OF INSUFFICIENT. Under the facts presented in this case, Held, there was nothing to justify the conclusion that the administrator, as charged in the petition, falsely represented to the probate court that all the assets of the estate had been administered and applied to the payment of debts.

Appeal from Franklin Circuit Court.—Hon. A. J. Seay, Judge.

AFFIRMED.

J. C. Kiskaddon with J. R. Martin for appellant.

That a judgment obtained by fraud can be annulled, is an elementary rule of equity. Mayberry v. McClurg, 51 Mo. 256; Sweet v. Maupin, 65 Mo. 65; Freeman on Judg., §§ 486, 489, 491; Clyce v. Anderson, 49 Mo. 37; Strong v. Wilkson, 14 Mo. 116; Thomasson v. Brown, 43 Ind. 203; 3 Redfield on Wills, (3 Ed.) § 232; Wood v. Lee, 5 T. B. Mon. (Ky.) 50; Clark v. Shelton, 16 Ark. 474. The notice published by respondent of his intention to make final settlement of Reichard's estate, was in law no notice, it having been published in the English language on the English side in a newspaper, one side of which was printed in English and the other in German. R. S. 1879, §§ 1035, 238; Graham v. King, 50 Mo. 22; Hallett v. Reighters, 13 How. P. 43; Boyland v. Boyland, 18 Ill. 552; Brownsfield v. Dyer, 7 Bush (Kv.) 505; Gray v. Larimore, 2 Abb. (N. S.) 542. A final settlement is a judgment, and when rendered without notice is void. Murry v. Roberts, 48 Mo. 307; Rooch v. Barnes, 33 Mo. 319; Brashears v. Hicklin, 54 Mo. 102. The bar of the statute of limitations does not apply. Martin v. Knapp, 45 Mo. 48; Keeton v. Keeton, 20 Mo. 530; Poe v. Domec, 54 Mo. 119.

Crews & Booth for respondent.

The publication of the notice of final settlement was legal and sufficient. Graham v. King, 50 Mo. 23, is inapplicable. The finding of the probate court on the sufficiency of the publication of the notice is conclusive. Raley v. Guinn, 76 Mo. 263. The final settlement can be set aside only for fraud alleged and proved, and no fraud was proved. Lewis v. Williams. 54 Mo. 200; Sheets v. Kirtley, 62 Mo. 418. The remedy of appellant against respondent for failure to sell the real estate for payment of debts, was by action on the latter's bond. R. S., § 290; Woodworth v. Woodworth, 70 Mo. 601; Cohen v. Adkins, 73 Mo. 163. Plaintiff's action

is barred by the statute of limitations. Rogers v. Brown, 61 Mo. 187; Mitchell v. Williams, 27 Mo. 399.

Norton, J.—The defendant, George Bergner, administered upon the estate of one August Reichard, who died intestate in Franklin county, in March, 1866, and among other property mentioned was the following real estate in the town of Washington in said county, viz., a part of lots 55 and 56, in block 15, between the property of Matthias Liggs and George Bergner, fronting twenty-eight feet and six inches on Lafayette street, by 132 feet deep. Said estate continued in process of administration till the March term, 1869, of the probate court, when said Bergner made his final settlement, which was approved by said court, and said Berger discharged as administrator.

Plaintiff, McLean, who, on the 23rd of March, 1866, had procured an allowance against said estate for the sum of \$1,131.70, with ten per cent interest, and which was assigned to the fifth class of demands, no part of which was paid, instituted this suit on the 2nd day of May, 1879, to vacate and annul said settlement, setting up the above facts in his petition and alleging that during the course of the administration there were no personal assets in the hands

of the administrator to pay said allowance.

It is further alleged that said final settlement was made without any notice thereof being given, as required by law; that at the time of the filing and approval thereof, the said estate had not been in point of fact fully administered; that the allowances against the said estate (including the aforesaid allowance of plaintiff) had not been paid, and that the aforesaid described real estate, though inventoried as assets, had not been sold for the payment of such allowances.

And plaintiff further states, that the said defendant fraudulently intending and contriving to cheat and defraud the plaintiff and other creditors out of their lawful demands against said estate, and thereby convert to his own use the

rents and profits of said real estate, (of which said real estate he was then, and ever since then hath been in possession, using and enjoying as his own,) falsely and fraudulently represented to said probate court that due notice of his intention to make final settlement of said estate had been given; that all the assets of said estate had been administered upon and applied to the payment of the debts, and by means of such false and fraudulent representations induced said court to approve said settlement and discharge him as such administrator; that the fraudulent practices of the defendant in the premises, and the action of the court in approving said settlement, operate as a fraud upon the plaintiff; that the defendant and the sureties upon his administration bond are insolvent, and plaintiff is remediless in the premises, except through the aid of a court of equity.

Defendant in his answer denies all the allegations of the petition as to the charges of fraud in making said settlement, and avers that he gave due notice of his intention to make the same, which fact was found by the probate court after hearing proof of notice. It is further averred that in December, 1864, said Reichard executed a deed of trust conveying the real property mentioned in the inventory to secure said Bergner in the payment of a note given him by said Reichard for \$900 payable in three years with five per cent interest; and that said debt was allowed and remained unpaid, and that at the time of his final settlement said real estate was not worth more than the debt due him for the payment of which it was bound, that the condition of said deed was broken, and defendant believing himself entitled to the possession of the property until redeemed by the payment of his debt went into possession of the property, and has remained in it ever since. It is further alleged that plaintiff's cause of action accrued more than five years next before the institution of this suit and is barred by limitation.

Plaintiff in his replication denies that defendant published in any newspaper printed in the English language 27-80

notice of his intention to make final settlement, and avers that on the 8th of February, 1868, he instituted an action in the circuit court of Franklin county, to annul and vacate the note and deed of trust mentioned in the answer of defendant and that in 1873 judgment was rendered by said court setting aside and vacating said deed of trust. circuit court rendered judgment for defendant from which plaintiff has appealed, and attacks the judgment on the

ground that it is against the evidence and the law.

It is a familiar principle, and needs only to be stated to be approved, that the final settlement of an administrator has the force and effect of a judgment, and can only be vacated when it is made clearly to appear that it is founded on fraud or mistake. The grounds relied upon by plaintiff for vacating the said settlement, are: 1st, That defendant falsely represented to the probate court that due notice was given of his settlement. 2d, That he falsely represented that all the assets of the estate had been administered upon and applied to the payment of debts. To sustain the first of the above grounds, plaintiff offered evidence showing that the notice of final settlement was published in the English language, and on the English side of a newspaper published and printed in both the English and German languages, one side of said paper being German and the other side being English. There was a total failure of evidence either showing or tending to show that defendant made any false representations to the probate court concerning the notice, but it does appear that the said court with the fact of the manner of its publication before it adjudged it to be sufficient, and we think its judgment was justified by the fact.

The case of Graham v. King, 50 Mo. 23, has been cited by counsel to show the insufficiency of the publication. In that case the notice of a trustee's sale was published in English in a paper printed wholly in German, and the court held that it was not sufficient, it being observed that "when notices are to be published in a paper, an English

paper is always intended unless it is otherwise expressed. The insertion of an English advertisement in a German paper would generally give less publicity to it than if published in the German language, as those among whom the paper circulates would not be able to read it in the English tongue. And if it were published in German, then it would be a sealed book to the most of those who read and speak English." The paper in which the notice in the case before us was published, was an English paper and also a German paper, and the notice was published in English on the English side, and none of the reasons given for holding the notice bad in the case in 50 Mo. supra, apply to it but on the contrary in a mixed community composed of both English and Germans, a notice published in English on the English side of the paper would be more likely to give a more extended notice than if published in a paper wholly English or wholly German, inasmuch as a paper published both in the German and English languages would be more likely in such community to have a more extended circulation than if wholly published in the one language or the other.

The second position taken by defendant is as untenable as the first. We find no evidence in the record justifying the conclusion that the defendant falsely represented to the probate court that all the assets of the estate had been administered and applied to the payment of debts. It is averred in plaintiff's petition, and the facts in the case show that there were no personal assets in the hands of the administrator applicable to the payment of plaintiff's demand, and the mere fact that defendant as administrator might and perhaps ought to have filed a petition asking for the sale of decedent's interest in the lots inventoried, cannot be construed into fraudulent representation that he had fully administered the assets as it clearly appears from the record that defendant in his first and second settlements as well as in his final settlement charged himself with the annual rent of the real estate, each of which settlements

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amounted to an assertion to the court that it had not been sold, and inasmuch as the plaintiff under the statute could at any time after the 23d of March, 1866, up to the date of the final settlement in 1869, have filed his petition in the probate court for the sale of decedent's interest in the real estate for the payment of his debt. This he did not do, but slept upon his rights till the final settlement was made, and then waited nearly ten years before instituting this proceeding assailing the settlement, though living in Washington where defendant also lived during that time. We are of the opinion that plaintiff failed to make out the case stated in petition and for that reason affirm the judgment, not deeming it necessary to pass upon the question of the statute of limitations pleaded by defendant.

Judgment affirmed, all the judges concurring.

HARRIS V. LEE, Appellant.

Instructions: REPETITION. The trial court commits no error in refusing to give an instruction which is substantially the same as one already given.

Appeal from Hannibal Court of Common Pleas.—Hon. Theo. Brace, Judge.

AFFIRMED.

Smith v. Krauthoff with Geo. M. Harrison for appellant.

Defendant's refused instruction should have been given. Story on Sales, § 313, note 2; Little v. Page, 44 Mo. 412; S.W. F. & C. P. & Co. v. Stannard, 44 Mo. 71; Griffin v. Pugh, 44 Mo. 326; Parmlee v. Catherwood, 36 Mo. 479; Boutwell v. Warne, 62 Mo. 350; 2 Benjamin on Sales, pp. 986, 989; Rice v. Groffman, 56 Mo. 434.

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Easley & Russell, D. H. Eby and Thos. F. Gatts for respondent.

Defendant's refused instruction number five, was but a repetition of number one given at his instance, and was properly refused. Palmer v. Railroad Co., 76 Mo. 217; Anthony v. Bartholow, 69 Mo. 186; State v. Miller, 67 Mo. 604; State v. King, 44 Mo. 238; Pond v. Wyman, 15 Mo. 175; Browne v. Fire Ins. Co., 68 Mo. 133. Defendant's said instruction was also erroneous in that it assumed that the conditions or terms of the alleged sale were not evidenced by writing executed, acknowledged and recorded by the vendee, Price, also that Lee was a bona fide purchaser without notice. Peck v. Ritchey, 66 Mo. 114; Wash. Mut., etc., v. St. Mary's Seminary, 52 Mo. 480.

Hough, C. J.—This is an action for replevin for two mules, originally brought against Robert Price and the present defendant, but dismissed as to Price. The defendant denied the right of the plaintiff to the possession of the mules and averred substantially that he had purchased the same of Price for the sum of \$250, believing Price was the owner thereof and without knowledge of claim thereto on the part of plaintiff. The purpose of this plea doubtless was to bring the defendant's case within the provisions of section 2505 or 2507 of the Revised Statutes, provided it should be developed in evidence that the plaintiff had made a conditional sale of the mules to Price, such as is described in the sections referred to. The testimony for the plaintiff was to the effect, that in November, 1879, he had hired the mules to Price; that Price had never purchased them from him, and had no authority to sell them.

The testimony for the defendant tended to show that plaintiff had sold the mules to Price for \$240, a portion of which sum was paid in cash, and the balance was to be paid in twelve months, and that on February 14th, 1880, he had purchased them from Price for \$250, supposing

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him to be the owner, and without notice that the plaintiff had any claim whatever upon them.

Such being the testimony, the only questions for the jury were, whether the plaintiff had sold the mules to Price, or had authorized Price to sell them for him. If he had made no sale to Price, absolute or conditional, and had not authorized Price to sell them for him, then the plaintiff was entitled to recover, there being no testimony whatever that Price claimed to own the mules, with knowledge on the part of plaintiff of such claim before the sale. These questions were submitted to the jury in appropriate instructions and they rendered a verdict for plaintiff. The instructions given at the request of plaintiff are not complained of in this court, but it is contended that the court erred in refusing the following instruction asked by the defendant:

5. The court instructs the jury that if they believe from the evidence that the plaintiff, Harris, sold and delivered the mules in question to Robert Price, one of the defendants, receiving part of the purchase money, the balance to be secured by a mortgage on said mules, and that Price sold and delivered said mules to Frank Lee, the property in said mules is completely vested in said Lee and the jury will so find for defendants.

So far as the issues involved in this suit are concerned, this instruction is substantially the same as the first instruction which was given for the defendant, which is as follows:

1. The court instructs the jury, that if they believe from the evidence, that the plaintiff Harris, sold and delivered the mules in question to Robert Price, one of the defendants, receiving part of the purchase money, balance to be paid at a subsequent time and that said Price sold and delivered said mules to Franklin Lee, one of the defendants, the property in said mules is completely vested in the said Lee and the jury will find for defendants.

The material question is, was there a sale of any char-

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acter. The precise terms of the sale, if one was made, are unimportant in view of the testimony. All that is material in the refused instruction, is contained in the instruction given, and the court did not err in refusing it.

The judgment of the circuit court will be affirmed.

All concur.

COWAN V. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAIL-WAY COMPANY, Appellant.

Railroads: COMPLAINT: REVIEWABLE ERRORS. The case of Jackson v. St. Louis, Iron Mountain & Southern R'y Co., ante, p. 147, affirmed.

Appeal from Butler Circuit Court .- Hon. R. P. Owen, Judge.

AFFIRMED.

Smith & Krauthoff with T. J. Portis for appellant.

Plaintiff's statement does not state a cause of action. Bates v. Railway Co., 74 Mo. 60, and cases cited; Asher v. Railroad Co., 79 Mo. 432. The instruction given on behalf of plaintiff was erroneous. Mumpower v. Railroad Co., 59 Mo. 242. Nor was there any evidence that the animal entered upon the railroad at a point where there was no fence, and where the railroad passed through adjoining, inclosed and cultivated fields or uninclosed land. Davis v. Railroad Co., 65 Mo. 441.

Edwin Silver and I. M. Davidson for respondent.

The statement is sufficient; certainly so after verdict. Bowen v. Bailraad Co., 75 Mo. 427; Beecher c. Railroad Co., 75 Mo. 515; Rozzelle v. Railroad Co., 79 Mo. 349; Bates v. Railroad Co., 74 Mo. 60; Welch v. Ryan, 28 Mo. 32. The evidence was sufficient to authorize the submission of the

case to the jury. Moore v. Railroad Co., 73 Mo. 438; Blewitt v. Railroad Co., 72 Mo. 583. The court cannot review the action of the trial court in giving and refusing instructions, because no exception is preserved in the bill to the overruling of the motion for a new trial. State ex rel. Estes v. Gaither, 77 Mo. 304.

Norton, J.—The point made by counsel that the statement fails to state a cause of action, is not well taken. The statement is precisely like the statement in the case of Jackson v. St. Louis, Iron Mountain & Southern R'y Co., ante,

p. 147, which was held to be good.

The only other point made by counsel is, that the court erred in its instructions, and this point cannot be considered by us, for the reason that the bill of exceptions does not show that any exception was taken to the action of the court in overruling the motion for new trial, and this under the ruling of this court in the case of State ex rel. Estes v. Gaither, 77 Mo. 304, forbids an examination of the instructions.

Judgment affirmed. All concur.

Wells, Administrator, Plaintiff in Error, v. Lincoln County.

Mortgage: Foreclosure: Furchaser at irregular sale. A foreclosure sale, under a mortgage, which sale is irregular because made during a term of the county court instead of the circuit court, as required by law, does not operate to assign the mortgage debt itself to the purchaser at the sale, so that he can both hold the land and collect the residue due from the mortgageor on the debt.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Norton, Martin & Dryden for appellants.

The foreclosure sale having been made during the term of the county court, and not during that of the circuit court, was an irregular one. R. S. 1855, p. 1425, § 30; Ib., p. 1090, § 13; Ib., p. 746, § 45. The sale being irregular, did not work a foreclosure of Bailey's equity of redemption, but operated as an equitable assignment of the mortgage, and transferred to Gordon all the county's rights. Robinson v. Ryan, 25 N. Y. 325; Brobst v. Brock, 10 Wall. 533; Walker's Ch. Reps. 494; 7 Cow. 13; Honaker v. Shough, 55 Mo. 475; Jones on Mort., §§ 1678, 1679; Grapengether v. Fejervary, 9 Iowa 163; Anson v. Anson, 20 Iowa 56; Johnson v. Harmon, 19 Iowa 56; Douglass v. Bishop, 27 Iowa 216; Bank v. Abbott, 20 Wis. 570; Stark v. Brown, 12 Wis. 584; Olmstead v. Elder, 2 Sandf. (N. Y.) 325; Mabley v. Nave, 67 Mo. 550. The question of the statute of limitations affects only the amounts collected by the county on the bonds prior to August 31st, 1873, as the suit was filed within five years of that time. The statute did not apply to the amounts collected before that time, because, when collected, it became a trust fund, and besides, it could not begin to run until Magruder had notice that the county was collecting the money.

G. T. Dunn for respondent.

The mortgage debt was not assigned to Magruder by the payment of only a portion of it; there must be a payment of the debt to effect such a result. *Mabley v. Nave*, 67 Mo. 550. Plaintiff is estopped to recover by reason of his laches. *Stevenson v. Saline Co.*, 65 Mo. 425; Wells v. Perry, 62 Mo. 576.

Philips, C.—This action was begun in 1878 in the circuit court of Lincoln county. It was tried on the following agreed statement of facts:

"It is agreed by and between plaintiff and defendant that the following is a correct statement of the facts in this case, except as hereinafter stated, which said plaintiff and defendant agree to submit to Hon. W. W. Edwards, circuit judge of Lincoln county, as a special finding for his determination and judgment. 1st, It is agreed that on the 11th day of February, 1863, David Bailey executed to the county of Lincoln three several notes or bonds, one for the sum of \$204.56, one for \$958.32 and one for the sum of \$614.45, each conditioned to bear ten per cent compound interest from date until paid. That for the purpose of securing said indebtedness the said David Bailey on the same day made, executed, acknowledged and delivered to said county of Lincoln a mortgage on certain lands therein described, amounting to 680 55-100 acres. That by the terms of said mortgage the sheriff of Lincoln county, on default being made in the payment of said debt, was authorized to sell said mortgaged premises upon being ordered so to do by the county court of Lincoln county. That the law in regard to said foreclosure required an order of sale to be made by the county court of Lincoln county-which order was to have the same force and be carried out by the sheriff in like manner as fieri facias on a judgment of foreclosure in the circuit court. (See R. C. 1855, page 1425, § 30, to which reference is made.) That there was a default made in the payment of the debt so secured by said mortgage; that the county court made an order and caused the same to be entered of record reciting the facts and directing the sheriff of Lincoln county to seize, levy on and sell the said real estate in said mortgage described, to satisfy the said mortgage debt and the costs thereof. That the sheriff of Lincoln county having been served with a copy of said order, duly certified, did by virtue of said order and the power and authority in him vested by said mortgage deed, levy on said property and advertise the same for sale, and on the 23rd day of September, 1864, at a regular term of the county court, did expose the same for sale

to the highest and best bidder for cash; that the same was stricken off and sold to John B. Gordon for the sum of \$200. That a deed was executed to him therefor and that said sale was approved by the county court. That the money received at said sale was paid into the county treasury and appropriated by the county court to the part payment of said notes, leaving a large amount still unpaid thereon. That afterward the said John B. Gordon transferred and assigned to Joseph P. Wilkinson all right, title and interest which he acquired by reason of said sale and purchase, who in turn sold and assigned the same to Henry Papin and that Henry Papin sold and assigned the same to Lloyd B. Magruder on April 21st, 1865. That said county of Lincoln has since said sale on the 23rd day of September, 1864, collected on said bonds and mortgage and appropriated to her own use various sums of money, the amount of said collections and the date thereof it is agreed are to be proved by the plaintiff. It is also agreed that the said bonds and mortgage were duly presented for allowance to the probate court of Lincoln county and were duly allowed and classified against the estate of David Bailey, deceased. That before the bringing of this suit the said Magruder departed this life and that Jeptha Wells was duly and legally appointed his administrator. Plaintiff contends that by reason of the facts herein, that said Magruder became the owner of said bonds and mortgage. Defendant denies that by reason of the facts set forth that plaintiff became the owner of said bonds and mortgage and contends also as further matter of defense that plaintiff had full knowledge that defendant was collecting said various sums of money on said bonds and mortgage and stood by and made no claim thereto, and that by reason thereof plaintiff is estopped from recovering in this suit and also pleads the statute of limitations as to all sums collected more than five years prior to the commencement of this suit, the defendant being required to introduce evidence to maintain said defenses of limitation and estoppel. If from the facts herein agreed to and the

evidence introduced by plaintiff and defendant the court should find the issues as set forth by plaintiff for him, then it is agreed that judgment shall be entered for plaintiff for all sums collected with interest, except such as are barred by limitations, or unless the plaintiff is estopped by reason of his acts as set forth by defendant's attorney, or unless the title to said bonds and mortgage failed to pass by said sale. But if the court shall find the issues set forth by defendant then judgment shall be entered for defendant."

The parties at the trial further agreed that the collections subsequently made by the county on the unpaid balance of said debt from Bailey, were as follows: In 1864, \$97.47; in 1865, \$632.20; in 1866, \$1,107.02; in 1867, \$83.72; in 1868, \$217.65; in 1869, \$176.64, in 1870, \$176.46; in 1871, \$176.46; in 1873, \$1,000.27. This suit is to recover

from the county these sums of money.

The circuit court found the issues for the defendant. The plaintiff, by writ of error, carried the case to the St. Louis court of appeals, where the judgment of the circuit court was affirmed. From this judgment the plaintiff has

brought the case, on error, to this court.

I. The statute, section 13, page 1090, Revised Statutes 1855, under which the foreclosure sale in question was made, provided that such sales should be made as under ordinary executions. This plainly required that the sale should be made during the term of the circuit court, whereas this sale was made during the session of the county court. This undoubtedly was such an irregularity as to prevent a transfer of the legal title of the mortgageor in the land, and left open to him the right of redemption on payment of the purchase money.

The contention of the plaintiff is, that while the sale did not work a foreclosure of Bailey's equity of redemption, it operated as an equitable assignment both of the mortgage and the entire mortgage debt as well. So that no one was entitled of right to collect the residue of the debt unpaid by the attempted foreclosure sale, except the

purchaser, his assigns and legal representatives; and, therefore, when the county received the further payments from Bailey, it held the same to the use and benefit of the party succeeding by the mesne conveyances to the rights of Gordan the same the relationship.

don, the purchaser at the sale.

The court of appeals, in its opinion, delivered by Lewis J., held that the mortgagee, when he sells the mortgaged premises, under the forms of law, and receives the purchase money, undertakes to convey to the purchaser the legal title, held by him, freed from the right of redemption by the mortgageor, yet if by reason of irregularity in the sale this title does not pass, while it may be effectual as against the mortgagee, the equity of redemption still remains to the mortgageor. And when the mortgageor redeems he does not pay the purchase money to the original mortgagee, but to the purchaser at the foreclosure sale, who has succeeded to the mortgagee's dominion. It is by this means that, in equity, the purchaser becomes the assignee of the mortgage debt, and not otherwise. But it does not follow that because the sale turns out to be irregular, especially while the purchaser is undisturbed in his possession, that he can both hold the land and claim the balance of the unpaid debt. If so, the condition of the purchaser, who should fail to acquire the legal title, would be better than that of him who should get a complete title. For there could be no pretense that, if a purchaser under a foreclosure should obtain the title of the mortgageor, so that the equity of redemption was gone, he would acquire any sort of claim to the mortgage debt unsatisfied. All he would acquire by his purchase would be the right, title and interest of the mortgageor in and to the land vested in him at the time of the execution of the mortgage. But under the logic of plaintiff's proposition, if the mortgage debt was \$5,000, consisting of the school moneys, held in trust by the county, and the real estate security was of the value only of \$1,000, in the event the sale was irregularly conducted, the purchaser without surrendering even the land, might enjoy it and re-

cover the remaining \$4,000 from the mortgageor. The practical working of such a principle of law demonstrates the absurdity of plaintiff's contention. The review of the authorities made by the learned judge, in the opinion above referred to, is a most complete answer to the misapplication of the texts cited by plaintiff's counsel in support of his position. They need not be restated here.

We will notice one referred to by counsel, on which he lays much stress. It is that of Robinson v. Ryan, 25 N. Y., 320, in which the proposition is asserted that the purchaser at a mortgage sale under an attempted statutory foreclosure, void as against the mortgageor for want of notice, stands as an assignee of the whole mortgage debt. This decision was brought to the attention of this court in the case of Watson v. Hawkins, 60 Mo. 550, 554. Sherwood, J., encountered, in the course of the opinion, the same proposition, in principle, asserted by plaintiff here. He said: "Judging from the authorities cited, it might be assumed that the idea prevailed that Massie having acquired all the right, title, interest and estate of plaintiffs in the lands, he thereby became the assignee of the deed of trust and of the debt it was designed to secure. And the case of Robinson v. Ryan, 25 N. Y., seems to give countenance to this view so far as mortgages are concerned; but has no reference to deeds of trust. Besides, these decisions are based on a special statute of the state of New York relating to the assignment of mortgages. But it has never been held for law in this State, that the transfer of the mortgaged premises would, per se, carry with it the right to the debt."

The case of *Honaker v. Shough*, 55 Mo. 472, cited by plaintiff as affirming the doctrine in *Robinson v. Ryan*, supra, must be understood in reference to the facts of that case. It appears clearly that the foreclosure sale there fully satisfied the mortgage debt. Hence, it is that Judge Adams said: "If the money raised by this sale was paid to the county, as we must presume it was, it extinguished the debt

due to the county, or, more properly speaking, it transferred the right of the county to the defendant. He thereby, in equity, became entitled to the mortgage debt."

As the purchaser had paid the entire debt, he became entitled to be subrogated to the place of the mortgagee, by equitable assignment, and to hold the premises against the mortgageor until he should redeem by paying to him the money paid in satisfaction of the debt which was a charge on the land. This is the principle repeatedly announced by his court. Valle v. Fleming, 29 Mo. 152; Jackson v. Magruder, 51 Mo. 55; Jones v. Mack, 53 Mo. 147; Russell v. Whitely, 59 Mo. 196; Wilcoxon v. Osborn, 77 Mo. 621.

In the case at bar the plaintiff, so far as shown by the agreed statement, holds all he thought he was buying. His possession has not been disturbed. The equitable title has, doubtless, by lapse of time, ripened into a perfect legal title. The purchaser obtained over 600 acres of land for the inconsiderable sum of \$200. His assignee now seeks to take out of the treasury of Lincoln county the balance of the money rightfully coming to it in trust for the school fund, without ever having paid this money to the county or any person. Equity, while subrogating a party to the rights of a mortgagee, will not aid him in despoiling the mortgagee of that which honestly belongs to the latter.

The judgment of the courts below are affirmed. All concur.

LEE V. KAISER, Appellant.

- 1. Justice's Court: APPEAL: NONSUIT: BAR. The plaintiff on appeal from a justice's court, has the right to dismiss his appeal in the circuit court, and thereby vacate entirely the judgment of the justice, and such judgment of nonsuit in the circuit court, and judgment of the justice, constitute no bar to another action.
- 2. ; NOTICE: DISMISSAL. An appeal having been taken

more than ten days before the next term of the circuit court, and notice thereof served within three days of the next succeeding term, *Held*, that necessity of notice relates to the time when it becomes triable against the appellee, that the appeal had been perfected and the court had jurisdiction, and the appeal could be dismissed at such succeeding term, and pending a motion to affirm the judgment of the justice.

Appeal from Cole Circuit Court.—Hon. E. L. Edwards, Judge.

AFFIRMED.

Hamilton & Fisher for appellant.

A nonsuit could not be taken in a case once tried upon its merits-an appeal case. McKnight v. Taylor, 1 Mo. 282, and cases cited; R. S., § 3556. No notice of appeal was given until within three days of the second term after it was taken, and the appellee had the right to have the judgment of the justice affirmed or the appeal dismissed. R. S., § 3057. Failure to give notice of the appeal amounts to a failure to prosecute. Wag. Stat., p. 850, § 21. And failure to give notice before the second term after appeal taken, will authorize an affirmance of the judgment. Wag. Stat., p. 344, § 16; Rowley v. Hinds, 50 Mo. 401; Page v. Railroad Co., 61 Mo. 78; R. S., § 3057; McCabe v. La Compte, 15 Mo. 78. Defendant was an indorser after maturity, and was entitled to notice of demand and non-payment. Light v Kingbury, 50 Mo. 331; Wade on Notice p. 338, § 738; Ib., p. 339, § 739.

Smith & Krauthoff for respondent.

Defendant's position that the judgment of the justice constituted a bar to this action, cannot be maintained. Upon appeal the circuit court became possessed of the cause, and it was its duty to try it anew. 2 Wag. Stat., p. 849, § 13; R. S., § 3052; Cates v. Akerd, 5 Mo. 124; Ser v. Bobst, 8 Mo. 506; Compton v. Parsons, 76 Mo 455, and

cases cited; Gant v. Railroad Co., 79 Mo. 502; Fitterling v. Railroad Co., 79 Mo. 504; Turner v. Northcutt, 9 Mo. 252; Moore v. Otis, 18 Mo. 118. It has been so ruled in other states under statutes similar to ours. Harris v. Laird, 25 Iowa 143; Railroad Co. v. Sater, 1 Iowa 421; Borden Mining Co. v. Barry, 17 Md. 419, 428. A nonsuit may be taken at any time before final judgment, and the effect of a nonsuit is to leave the plaintiff at liberty to bring a new action. Holland v. Hatch, 15 Ohio St. 464, 409; Foot v. Martin, 1 Met. 273, 274; Knox v. Waldborough, 5 Greenl. (Me.) 185; Delaney v. Reade, 4 Iowa 292, 295; Jones v. Underwood, 35 Barb. 211; Haws v. Tiernan, 53 Pa. St. 192, 194. Nor was plaintiff's right to take a nonsuit affected by the pendency of defendant's motion to affirm. Audobon v. Ins. Co., 23 N. Y. 216; Carlisle v. McCall, 1 Hilt. (N. Y.) 399; Horner v. Brown, 16 How. 354. Prior to the taking of the nonsuit defendant had appeared in court and consented to continuances, etc., and generally admitted himself in court, and his motion to affirm had long before been waived. Page v. Railroad Co., 61 Mo. 78; Wolff v. Danforth Co., 70 Mo. 182; Berry v. Union Trust Co., 75 Mo. 430. Having suffered a nonsuit, the plaintiff had a right to bring a new suit within one year thereafter. R. S., § 3239; Shaw v. Pershing, 57 Mo 416, et seq. Plaintiff received the note on account of a debt due him by defendant, and he was only bound to use ordinary diligence in presenting it and giving defendant notice of a refusal to pay. Edwards on Bills and Neg. Inst., (3 Ed.) § 287. Defendant stood in the relation of surety on the note. Southwick v. Sax, 9 Wend. 122; Hazard v. Wells, 2 Abb. (N. C.) 444, and cases cited. Indorsement of a promissory note after maturity, is equivalent to drawing a sight draft by the indorser upon the maker, and the indorser must present the same and give notice of non-payment within a reasonable time. Story Prom. Notes, (7 Ed.) p. 280, note. What constituted "due diligence" and "reasonable time," were questions of fact, and the finding below is conclusive. Fugitt v. Nixon, 44 Mo. 295;

Wallace v. Agry, 4 Mas. 336. Plaintiff's statement to defendant was a sufficient notice in form. Glasgow v. Pratte. 8 Mo. 336; 2 Dan. Neg. Inst., (3 Ed.) § 972. And defendant's conduct and statements were a waiver of presentment Wilson v. Huston, 13 Mo. 149; Dorsey v. Watson, 14 Mo. 59; 2 Dan. Neg. Inst., (3 Ed.) §§ 1148, 1152, 1162. And whether the statements of defendant amounted to a waiver, was a question of fact. There is evidence from which such waiver may be inferred, and the finding below must stand. Leonard v. Gary, 10 Wend. 504; Hazard v. White, 26 Ark. 155; Ross v. Hurd, 71 N. Y. 24; Jones v. O'Brien, 26 Eng. Law and Eq. 283; Hicks v. Duke of Beaufort, 4 Bing. (N. C.) 229; 2 Edwards Bills and Neg. Inst., (3 Ed.) pp. 651, 654. It was never contemplated by the parties that the plaintiff should be held to a strict performance of the duties of an ordinary indorsee. 2 Dan. Neg. Inst., (3 Ed.) § 1103; Boyd v. Bank, 32 Ohio St. 529; Moyer's Appeal, 87 Pa. St. 129; Minturn v. Fisher, 7 Cal. 573.

Martin, C.—This is an action on a promissory note made by one Henry Boggs, payable to the order of John B. Kaiser, defendant, in the sum of \$56, bearing ten per cent interest and indorsed by said Kaiser to plaintiff. The suit is against defendant as indorser. Presentment, demand and dishonor of the note are alleged in the petition. It is also averred that the maker was insolvent, and that a suit against him would be unavailing, and that the defendant, with a knowledge of all these facts, promised to pay the note.

The defendant, in his answer, denies the allegations of the petition, and pleads a judgment in his favor against the plaintiff on the same note as in bar of the suit. The new matter in bar is put in issue by replication. No instructions were asked or given. At the close of the evidence the defendant interposed a demurrer as it were to the evidence, claiming that it failed to establish the case alleged in the petition. Judgment was rendered for plaintiff.

On the merits of the prima facie case alleged by the plaintiff, the evidence supports the judgment. The evidence tends to prove that the defendant, after a full knowledge of the facts attending the dishonor of the note, admitted his obligation to pay it, and gave in excuse only his inability to do so. The evidence sustains the waiver of diligence pleaded in the petition. The evidence given in support of the plea in bar by reason of a former judgment, does not sustain the plea. It seems that the plaintiff brought suit in 1877 against the defendant on the same note before a justice of the peace, and that the trial resulted in a judgment for defendant. The plaintiff appealed in due time. The appeal was taken more than ten days before the May term of the circuit court, 1877. Notice of the appeal was not served till within three days of the December term, The defendant appeared at said term and moved for an affirmance of the judgment. While the motion was pending the court permited the plaintiff to take a nonsuit of his case, and a judgment of nonsuit was entered. Such a judgment does not constitute a bar to another action. Under our practice the plaintiff, on appeal from a justice's court, has always been accorded the right of dismissing his suit and thereby vacating entirely the judgment before the Turner v. Northcutt, 9 Mo. 252; Moore v. Otis, 18 Mo. 118; Town of Carrollton v. Rhomberg, 78 Mo. 547. Therefore the judgment of the justice constitutes no bar, it having been vacated by the appeal and dismissal of the There was no irregularity in the court permitting the dismissal of the suit at the time it was done. The appeal had been perfected and the court had jurisdiction of The necessity of a notice of the appeal relates to the time when it becomes triable as against the appellee. The court being possessed of the case, no mere irregularity in entering its judgment could be impeached in a collateral proceeding.

The judgment is affirmed. All concur.

The State ex rel, Brainerd v. Thayer.

THE STATE ex rel. Brainerd v. Thayer, Judge of the St. Louis Circuit Court.

- 1. Appeal: SUPERSEDEAS. The circuit court of the city of St. Louis granted, of its own motion, a new trial to plaintiff in a cause pending therein, and in obedience to a peremptory writ of mandamus from the St. Louis court of appeals, procured and served at the instance of the defendant in the cause in the circuit court, the order granting the new trial was vacated on terms imposed by the judgment of the court of appeals, Held, that neither the appeal with supersedeas bond taken by the judge of the circuit court to the Supreme Court, from the judgment in the mandamus proceeding, nor the same taken by the relator therein, being the defendant in the cause in the circuit court, would operate to stay a trial of said cause in the circuit court.
- An appeal can operate as a supersedeas only in the case in which it is taken.

Prohibition.

WRIT DENIED.

Phillips & Stewart and W. C. Marshall for relator.

P. Wm. Provenchere for respondent.

The judgment of the court of appeals was not superseded by the appeal. It was actually and fully executed before any appeal was taken. High Extra. Rem., § 766; Smith v. Allen, 2 E. D. Smith 259; Sherrill v. Campbell, 21 Wend. 287. An appeal accompanied by a bond operates a supersedeas only in the case in which it is pending. Welch v. Cook, 7 How. Pr. 287; Wilkes v. Henry, 4 Sandf. Ch. 395. Before this court will grant a writ of prohibition, it should clearly appear that the circuit court has no jurisdiction. High Extra. Rem., §§ 767, 770, 780; Ex parte Peterson, 33 Ala. 78. The relator is in effect asking for an interlocutory injunction against the circuit court pending the case for mandamus, and this is not permissible. Ex parte Peterson, supra,

The State ex rel. Brainerd v. Thayer.

HENRY, J.—Charles O. Patier and William Wolf sued relator in the circuit court of St. Louis, on two promissory notes. Brainerd, in his answer, pleaded two counter-claims, and on a trial of the cause before Judge Adams, on the 29th day of April, 1882, the jury returned a verdict against plaintiff for \$2,000 on the first counter-claim, and for plaintiff on the second. The court, of its own motion, set aside the verdict, and afterward, May 4th, 1882, defendant moved for a judgment on the verdict, which the court overruled on the 12th of May, whereupon the defendant applied to the St. Louis court of appeals for a mandamus to compel Judge Adams to enter the judgment on the verdict. Judge Adams appeared and filed his motion in the court of appeals to quash the writ, which that court overruled. This occurred June 27th, 1882. Judge Adams filed his bill of exceptions and declined to plead further, and the result of the mandamus proceeding was the issuance of a peremptory writ commanding him to enter judgment forthwith on said verdict, and to allow either party four days after his compliance with said writ, to file a motion for a new trial or in arrest of judgment. This writ was issued on the 28th of June, 1882, and on the same day the judgment was entered as commanded, and plaintiffs filed their motion for a new trial in four days, which was granted December 11th, 1882.

On the 29th of June, 1882, relator filed his motion in the court of appeals for a modification of its judgment, by striking out that portion which directed leave to be given to either party to file motion for new trial or in arrest of judgment, which motion was overruled, and relator filed his bill of exceptions, and on the same day Judge Adams was granted an appeal to this court from the judgment in the mandamus proceeding, and gave appeal bond in the penalty required by the court of appeals. On the 1st of July relator was granted an appeal, but filed no bond. When the motion for a new trial was filed in the circuit

The State ex rel, Brainerd v. Thayer.

court on the 28th of June, defendant appeared and resisted the motion, and after it was sustained, he filed his motion to set aside the order, which was overruled, and he filed his exception, and afterward, on the same day plaintiffs asked and obtained leave to withdraw their replication to defendant's answer, and filed their motion to require defendant to make his answer more definite and certain, and at this stage of the proceedings the cause was transferred to room No. Defendant afterward sug-5, Judge Thayer's division. gested the death of Wolf, one of the plaintiffs, and on application of Chas. O. Patier, he was permitted to prosecute the suit as surviving partner, and the motion to make the answer more definite was sustained, and defendant's motions to set aside those orders and for a stay of proceedings until a determination of the mandamus proceeding in the court, was overruled. Afterward, in October, 1883, Brainerd filed in the court, in the mandamus proceeding against Adams an appeal bond in the sum of \$200.

On these facts the relator asks that this court prohibit Judge Thayer from proceeding in this said cause of Patier v. Brainerd until this court shall have rendered a judgment in the mandamus cause pending here on appeal. This must be denied. If this court affirm the judgment of the court of appeals, relator has naught to complain of but subsequent orders made in the cause, to which it appears he has duly saved his exceptions. If that judgment be reversed, it must be upon the ground that no error was committed by Judge Adams in setting aside the verdict of his own motion; and Judge Thayer's trial of the cause will be on the same footing as if it had remained in Judge Adams' division, and he had proceeded to try it; and all improper orders heretofore made, if any, have been duly excepted to and bills of exceptions filed, and it will be defendant's own fault if any occur subsequently to which exceptions are not made and properly preserved.

If this court should hold that the court of appeals did right in awarding a writ of peremptory mandamus, The State ex rel. Brainerd v. Thayer.

but erred in so much of that judgment as gave leave to either party to file a motion for a new trial or in arrest, within four days after the judgment should be entered as commanded, it may complicate and embarrass the case, but at whose door does the fault lie? As soon as defendant obtained his judgment in the court of appeals awarding the peremptory writ, in which he alleges there was error, instead of taking his appeal from that judgment and staying the proceedings until it could be heard, in hot haste he had the mandate of the court of appeals served on Judge Adams the same day the judgment was rendered, which ordered him to do the very thing of which defendant now complains. But if such should be the decision of this court, an appeal from any judgment which may be rendered against him would probably have the effect to restore the original judgment, if defendant in the trial of that cause properly saved his exceptions. That, however, we shall not now determine

The appeal taken by Judge Adams, nor that taken by relator from the judgment in the mandamus proceeding, in which Patier and Wolf were in no sense parties, had not the effect to stay proceedings in the case of Patier against respondent. Certainly not after the judge has obeyed the mandate of the court of appeals by entering the judgment on the verdict, and then in obedience to the writ permitted plaintiffs to file their motion, and in the exercise of his judicial function, granted it. An appeal cannot operate as a supersedeas in any case except that in which it is taken. This would seem too plain for controversy.

Conceding that the appeal of Judge Adams on his executing an appeal bond, operated as a supersedeas, yet he has complied with the mandate of the court of appeals, the enforcement of which was all that was superseded. We cannot see how the pendency of either Judge Adams' or relator's appeal, or any order made in the cause either by Judge Adams or Judge Thayer, furnishes any ground for the position that Judge Thayer will be guilty of any usur-

pation or abuse of authority by proceeding to try the cause. All they have done has either been in obedience to the mandate of a superior tribunal, or in the exercise of their functions as judicial officers. Ex parte Peterson, 33 Ala. 78. "The remedy by prohibition is never allowed except in cases of a usurpation or abuse of power, and not then, unless other existing remedies are inadequate to afford relief." High on Extra. Rem., § 767.

Our conclusion is, that relator is not entitled, on the facts, to the writ of prohibition. And the demurrer to this petition is sustained. All concur.

Moll, Plaintiff in Error, v. The Market Street Bank.

Contract, Construction. Defendant, a bank, recovered judgment on its cashier's bond on which S., B. and plaintiff were sureties, and thereafter plaintiff paid part of judgment under an agreement with defendant that execution as to its residue should be staid as to him until the appeal taken by B. in the suit on the bond should be determined, and all lawful means be used to obtain the residue of the judgment from B., Held, in an action for breach of this contract, that on the affirmance of the judgment appealed from by B. the defendant was not bound to seek satisfaction for the residue of said judgment against the sureties on B.'s appeal bond before making the same out of plaintiff.

Error to St. Louis Court of Appeals.

AFFIRMED.

D'Arcy & Nagel for plaintiff in error, cited 2 Parsons on Contracts, (6 Ed.) p. 499; Wescott v. Fargo, 61 N. Y. 543; Building Asso'n, v. Platt, 5 Duer (N. Y.) 675; Schermerhorn v. Conner, 41 Mich. 374; Torrey v. Bank, 9 Paige 650; Michond v. Girod, 4 How. (U. S.) 556; 1 White & Tudor L. C., pt. 1, 251; Cumberland, etc., v. Parish, 42 Ind.; Thornton v. Irwin, 43 Mo. 157; Hunter v. Hunter, 50 Mo.

445; Beeson v. Beeson, 9 Barr 279; Whetstone v. Shaw, 70 Mo. 575; Bliss Code Plead., p. 6.

A. R. Taylor for defendant in error.

The bank was not bound by the contract to prosecute the sureties on Bernecker's bond before resorting to Moll, because the contract does not say so, and the court will not enlarge the terms of the contract. It did not constitute the bank Moll's agent or trustee for any purpose. Also cited Landrum v. Bank, 63 Mo. 48; Morman v. Talbut, 35 Mo. 392; Marshall v. Means, 12 Ga. 61; Regan v. Walker, 1 Wis. 631; Dickman v. Burgess, 20 Ill. 266: Hoyt v. Coughlan, 41 Ill. 131.

Hough, C. J.—The plaintiff stated in his petition that on or about the 30th day of March, 1875, the defendant recovered judgment for the penalty of a bond executed to it some time before, by its cashier, William A. Stumpe, as principal, Paul Steffens, John L. Bernecker and the plaintiff as sureties, conditioned for the faithful discharge of said cashier's duty to the defendant, and that said judgment was against said cashier and said sureties, and that execution was ordered to issue for \$12,135.95, interest and costs.

That on the 6th day of April, 1875, he paid the defendant \$4,434.20, on account of said judgment, in consideration of an agreement then and there entered into between the defendant and him, which is in words and figures as follows:

APRIL 6th, 1875.

Received of A. Moll, \$4,434.20, on account of a judgment rendered in the circuit court of St. Louis county, Missouri, in case numbered 26,587, wherein Market Street Bank was plaintiff, and William A. Stumpe, Adolph Moll, Paul Steffens and John L. Bernecker were defendants; and the execution as to the remainder of said judgment is to be stayed as to said A. Moll, until the appeal taken by John L.

Bernecker, in said cause is determined, and all lawful means used to obtain the balance of said judgment from said Bernecker, and in case said balance shall be recovered against said Bernecker, and the same is paid in full with all costs and interests, then this receipt is to be in full payment of all liability of said Moll on account of said judgment.

Joseph Schneider, President of Market Street Bank.

Plaintiff further averred that when the appeal mentioned in said agreement was heard by the court of appeals, and said judgment was affirmed, said Bernecker and the sureties on his appeal bond were each solvent and able and willing to pay, but that the defendant only collected \$1,400 from said Bernecker, and wholly failed to collect or even demand the balance from the sureties in the appeal bond. Plaintiff further alleges that while he was absent in Europe the defendant, in violation of the agreement aforesaid, collected of him by execution the sum of \$8,206, for which he asked judgment. The answer was a general denial. The cause was tried by the court without the aid of a jury, and judgment was rendered for the defendant, which was affirmed by the court of appeals.

It appears from the testimony that the supersedeas on appeal, was discharged on account of the insufficiency of the bond before the judgment of the circuit court was affirmed by the court of appeals, and that defendant at once sued out execution against Bernecker and diligently, but unavailingly, endeavored to find property of said Bernecker subject to seizure and sale thereunder. Property belonging to Bernecker's wife was levied upon, and, after the judgment of affirmance in the court of appeals, was sold and purchased by the bank, and was thereafter conveyed to her for a consideration paid by her to the bank. After the judgment of affirmance by the court of appeals, execution was issued against the plaintiff and his property was sold, and no demand was ever made on the sureties on the appeal bond for the payment of the judgment. It does not

appear, as alleged in the petition, that the sureties were willing to pay, and it is quite evident, we think, that they were not able. But one single question arises upon this record, and that is as to the correctness of the action of the court below in refusing the following instruction asked by the plaintiff:

The court declares the law to be that under the contract sued on defendant was bound to apply to the sureties on Bernecker's appeal bond before levying upon plaintiff, unless such application would have been fruitless, and the burden to show that it would have been fruitless, is upon the defendant.

Much has been said in argument about the failure of the defendant to pursue Bernecker with an execution after the judgment of affirmance, but that point is not presented in the instruction. So far as the instruction is concerned, it impliedly concedes what we think the testimony conclusively shows, that all lawful means had been used to collect the amount of the judgment from Bernecker in person. The contract between Moll and the defendant did not contemplate that the supersedeas would be discharged before the cause was determined in the appellate court. But the defendant did right to issue execution against Bernecker as soon as it was discharged, and would have been guilty of negligence, which might have exonerated Moll if it had waited until the judgment of affirmance was rendered before issuing execution. The testimony shows that Bernecker was prosecuted to insolvency. It is contended, however, that it was the duty of the defendant to also make demand upon the sureties on the appeal bond before issuing execution against Moll. In our opinion, no such obligation arises from the stipulation in the contract, to use all lawful means "to obtain the balance of said judgment from said Bernecker." No execution could issue against the sureties on the judgment of affirmance in the court of appeals. The sureties could only be made liable by action. If it was the duty of the defendant to demand payment of

Flannery v. Coates.

the sureties, then in the event of their refusal to pay, it would have been its duty also to sue the sureties, and in the event of their appealing from a judgment against them and an affirmance thereof, then to make demand also of their sureties on appeal, and in the event of their failure to pay, then to sue them, and so on ad infinitum. This is evidently what the court of appeals meant by saying that the defendant was not bound by its contract with Moll to enter upon interminable litigation, and we fully agree with that court. The defendant was not bound, under its agreement with Moll, to make demand of, or bring suit against, the sureties of Bernecker before taking out execution against Moll, and the instruction asked was rightly refused. This disposes of the case. The other questions argued, are not before us. Parties cannot institute an ordinary action at law for a breach of contract, and try it as such, and on appeal to this court expect us to disregard the pleadings and instructions, and pass upon the testimony as if it were an equitable proceeding.

The judgment of the court of appeals is affirmed. The other judges concur.

FLANNERY et al., Appellants, v. Coates et al.

Paper Deposited in Bank for Collection and Credit. If paper be deposited in or forwarded to a bank for collection, and in pursuance of the usual mode of dealing, the bank places the amount to the credit of the depositor, and the latter thereupon draws, or is entitled to draw, against the same as cash, this works a transfer of title so that the depositor cannot afterward claim the paper, and it is immaterial that if the paper is not paid the bank has the right to charge it back. Ayres v. Bank, 79 Mo. 421, followed and re-affirmed.

Flannery v. Coates.

Appeal from Jackson Circuit Court.—Hon S. H. Woodson, Judge.

AFFIRMED.

Cates, Campbell & Keplinger for appellant.

Woodson and Karnes & Ess for respondent.

Ewing, C.—On August 1st, 1878, plaintiffs, bankers at Parkville, owned a draft drawn by Collier & Atkins, on the defendants Cockrill, who were bankers at Platte City, for \$600, payable to J. L. Johnson, or order. On the same day plaintiffs drew on S. C. Woodson of Platte City, for \$500, in favor of the Mastin Bank, and on the same day sent both drafts to the Mastin Bank, inclosed in a letter as follows:

"PARKVILLE BANK, PARKVILLE, Mo., Aug. 1, 1878.

JOHN J. MASTIN, Esq., Cashier, Kansas City, Mo.:

Dear Sir: I inclose for our credit, etc." Were received by the Mastin Bank on the 2nd day of August, and credited on its books to plaintiffs, and on the same day forwarded to Cockrill & Co., at Platte City, "for collection and credit," and charged them to Cockrill & Co. Were received by C. & Co. the same evening, and were paid on the morning of August 3rd, and credited to the Mastin Bank, which left due the Mastin Bank a balance of \$226.43, which was afterward sent to and received by the assignee, Coates. That it was a custom among corresponding banks and of the Mastin Bank, to credit drafts sent by correspondents for collection on receipt, without awaiting instructions, and in case of non-payment, to charge them back. That the Mastin Bank closed its doors on the evening of August 2nd, and made a general assignment on the 3rd. The plaintiffs seek to hold the receiver, Coates, and the defendants, Cockrill, upon the theory that the Mastin Bank was acting only as plaintiffs' agent, and that the drafts were not paid until after the suspension of the Mastin Bank.

Carpenter v. St. Louis, Iron Mountain & Southern Railway Company.

This identical question has been decided at this term, in a well considered opinion, by Mr. Justice Henry, in the case of Ayres v. Farmers & Merchants' Bank, 79 Mo. 421. In that case the authorities are reviewed, and we deem it unnecessary to more than refer to it. See also Bullene v. Coates, 79 Mo. 426.

The judgment below is affirmed All oncur.

CARPENTER V. THE St. Louis, Iron Mountain & Southern Railway Company, Appellant.

Jackson v. The St. Louis, Iron Mountain & Southern Railway Company, ante, p. 147, affirmed.

Appeal from Butler Circuit Court.—Hon. R. P. Owen, Judge.

AFFIRMED

Smith & Krauthoff with T. J. Portis for appellant.

Edwin Silver for respondent.

NORTON, J.—The same questions passed upon by this court at the present term in the case of Jackson v. The St. Louis, Iron Mountain & Southern R'y Co., ante, p. 147, are involved in this case, and for the reasons given in the opinion in that case, the judgment is affirmed. All concur.

. . .

EX PARTE CRENSHAW.

- 1. Contempt: Punishment therefor. Petitioner was found guilty by the circuit court of Jackson county, of contempt in willfully violating its restraining order, by removing and refusing to return certain fixtures in controversy in a pending civil suit, and was adjudged to pay the adversary party therein \$150, as costs and expenses incurred by the latter in the contempt proceeding; also to pay a fine of \$500, and that he restore the property mentioned in the order and be committed to jail until he paid said sums of money and returned the property, Held, that so much of the judgment of the court as related to the payment of the fine and the \$150, was illegal and void.
- 2. Orders of Court, Violation of: IMPRISONMENT: CONSTITUTION. The court can imprison a person until he obeys its lawful order, which it is in his power to perform, but it cannot, in making the order of commitment for enforcing its order, impose a fine or imprisonment as a punishment for the contempt of the offending party in disobeying the same, nor can it adjudge the payment and imprisonment till paid of costs and expenses incurred in the contempt proceeding, in favor of the adversary party, as this would be in violation of article 2, section 16 of the constitution, prohibiting imprisonment for debt.

Habeas Corpus.

WRIT DENIED.

L. C. Slavens for petitioner.

This was a proceeding for criminal contempt, based on Revised Statutes, sections 1055, 1056, and the court exceeded the limit of punishment in imposing a fine of \$500. Phillips v. Welch, 11 Nev. 187; Howard v. Durand, 36 Ga. 346. The court exceeded its jurisdiction in committing petitioner until he paid \$150 costs and expenses to the plaintiff; this was imprisonment for debt. 39 Mo. 286; 18 Mo. 484. The court having exceeded its jurisdiction, the statute authorizes the prisoner's discharge. R. S., §§ 2688, 2650.

Wash Adams also for petitioner.

The court exceeded its jurisdiction both as to the mat-

ter and sum, and the petitioner is entitled to be discharged under R. S., § 2650; Cons., art. 2, § 16; R. S., §§ 4041, The proceeding was for a criminal contempt founded on Revised Statutes, section 1055, and the punishment was for what petitioner had already done. 36 Ga. 358; 59 Cal. 408; 11 Nev. 187. The imprisonment of petitioner for the non-payment of the \$150 to plaintiff Holmes, was imprisonment for debt. 39 Mo. 286; 18 Mo. 484; 65 N. C. 518, 637; 51. Vt. 630; 14 Abb. Pr. Rep. 188; 6 Iowa 245; 44 Wis. 411; 11 Nev. 187; 59 Cal. 408; 35 Mich. 138; 7 Hill 301; 3 Lans. 413. The judgment cannot be valid in so far as it imprisoned petitioner for failue to restore the property, if invalid as to the \$500 and the \$150 to be paid to Holmes. Ex parte Lange, 18 Wall. 176; Rex v. Collyer, Sayer's Rep. 44; 1 Dallas 135; 49 Mo. 291; 7 Mo. App. 368; 6 Mo. App. 474; 60 N. Y. 559; 43 Mo. 502; In re Henry, 1 D. & L. 846; Shank's case, 15 Abb. Pr. (N. S.) 38; Ex parte Bemert, 7 Pac. C. L. J. 460.

Gage, Ladd & Small, contra.

The constitutional provisions relating to imprisonment for debt, apply to only ex contractu debts, not to debts arising from the commission of a tort in the nature of fines. Blewett v. Smith, 74 Mo. 405. There is no statute in this State limiting the common law discretion of a court of equity to punish parties for a violation of its lawful orders. R. S., §§ 1059, 2716; 2 High on Inj., § 1454, and note; Rogers, etc., v. Rogers, 38 Conn. 121; Williams v. Lampkins, 53 Ga. 200; Theweatt v. Gammell, 56 Ga. 98; Byne v. Byne, 54 Ga. 257; Doubleday v. Sherman, 8 Blatch. 94. The contempt being plainly charged in the commitment, the prisoner must be remanded. R. S., §§ 2648, 2651; Ex parte Goodin, 67 Mo. 637; Ex parte Toney, 11 Mo. 661; State v. Gower, 44 Mo. 181; In re Harris, 47 Mo. 164; Ex parte Kauffman, 73 Mo. 588; Bank v. Kerchevel, 65 Mo. 682. But even if all except one of the severable portions of the sen-

tence were absolutely void, the prisoner should be remanded until he performed the valid part. People v. Baker, 89 N. Y. 461; People v. Jacobs, 66 N. Y. 8; Matter of Sweatman, 1 Cow. 144; Taff v. State, 39 Conn. 82; State v. James, 37 Conn. 355; Ex parte Lange, 18 Wall. 163; Houck v. Cross, 67 Mo. 152; Lenox v. Clarke, 52 Mo. 115. On appeal in criminal cases, judgments are not regarded as entireties. State v. Alexander, 56 Mo. 131; State v. Turner, 63 Mo. 436; State v. Kelso, 76 Mo. 505.

HENRY, J.—It appears from the petition and copy of the record accompanying it, that the petitioner is imprisoned in the common jail of Jackson county by virtue of a judgment rendered by the circuit court of Jackson county, in certain proceedings against him, as for contempt of court, as petitioner avers, in an alleged violation of an ex parte order of injunction issued by that court. One James T. Holmes obtained a judgment of restitution against petitioner in a suit for unlawful detainer of the first floor of a builing in Kansas City, and certain fixtures therein. From that judgment petitioner appealed to the circuit court of Jackson county, and Holmes filed his petition for an injunction to restrain petitioner from removing any of said fixtures, and the court made an ex parte order to that effect. After service of the order, petitioner removed some of the articles embraced in the order, and thereupon an information was duly filed against him, charging him with contempt of court, and subsequently a temporary injunction was granted of the same purport as the ex parte order.

Upon the information petitioner was tried by the court, which found that he had violated said restraining order, and he was ordered to restore the property removed by the next morning. On the next day the court found that he had not complied with the restoring order, and found him guilty of contempt in willfully violating said restraining order, and adjudged that he pay said Holmes all his costs and expenses incurred in said proceedings, which the court found

to be \$150; also a fine of \$500; and that he restore the property mentioned in the order, and be committed to jail, there to be held by the keeper thereof until he shall have paid said sums of money and returned said property.

It is ably argued by counsel for petitioner that the proceeding against him was as for a criminal contempt under section 1055, Revised Statutes, which is as follows: "Every court of record shall have power to punish as for a criminal contempt, persons guilty of any of the following acts, and no others: 1st, Disorderly, contemptuous or insolent behavior committed during its sittings in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. Any breach of the peace, noise or other disturbance directly tending to interrupt its proceedings. 3rd, Willful disobedience of any process or order lawfully issued or made by 4th, Resistance willfully offered by any person to the lawful order or process of the court. 5th, The contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal and proper interrogatories."

Section 1056 provides that "Punishment for contempt may be by fine or imprisonment in the jail of the county where the court may be sitting, or both, in the discretion of the court, but the fine in no case shall exceed the sum of \$50, nor the imprisonment ten days, and where any person shall be committed to prison for the non-payment of any such fine, he shall be discharged at the expiration of thirty days." Section 1059 declares that "Nothing contained in the preceding section shall be construed to extend to any proceedings against parties or officers as for contempt for the purpose of enforcing any civil right or remedy."

The effect of this section is to leave the punishment for contempt in cases other than those embraced in section 1055, as at common law. The power to commit as for contempt any officer or party in a proceeding for the purpose of enforcing a civil right or remedy, relates only to such

conduct as tends to defeat or impair the right or remedy of a party. It must be for a disobedience of some order or process made or issued, in order to preserve such right as the parties, or adverse party, may establish to the property in controversy. If not of this character, the conduct alleged to be in contempt of court must fall under one of the subdivisions of section 1055, or is not contempt at all.

The restraining order in this case was made for the purpose of preventing the removal of the property in litigation, to which both Holmes and the petitioner severally laid claim. Its object was to preserve the property, and keep it within the jurisdiction of the court, so that in the event that Holmes succeeded in the pending litigation, it could be reached by the process of the court. Its violation tended to defeat such right as Holmes might establish in the property and prevent the seizure of the same in his behalf by the sheriff, under such process as might be issued on the final determination of the case. Such orders are not adjudications upon the right of property, but are only made with reference to ultimate results, and virtually place the property in custodia legis until those ultimate results are reached. The proceeding against the petitioner, therefore, was not as for a criminal contempt, in the sense of section 1055. It was instituted by Holmes for himself, and not for We have not overlooked the case of *Howard* r. Durand, 36 Ga. 346, in which the defendant was enjoined from selling or disposing of property in litigation, and violated the injunction, and in which the supreme court of that state said: "Suppose the court had committed the defendant for said contempt, would that afford any remedy to Howard? Would it restore the property sold? Do not the facts show that the only effect of the punishment would be to vindicate the authority of the court, and not to furnish any remedy for plaintiff." There is this marked difference between that and this case, in that there the party in contempt had put it out of his power to restore the property, and his imprisonment could only have been, as the

court observed, to vindicate the authority of the court. Here, however, it does not appear that the petitioner could not restore the removed property, and his imprisonment served the double purpose of vindicating the authority of the court and compelling a compliance with its order, which it might be assumed the petitioner has the power to do, as he has not alleged the contrary.

These two cases aptly mark the boundary line between the two classes of contempt recognized by our statutes. Where there has been such a violation of an order of court as puts it out of the power of the guilty party to comply with it, his punishment must be as for a criminal contempt, because it can be only punitive. But where what is enjoined can be done by the party, his disobedience subjects him to imprisonment, not as for contempt, but as a means of securing compliance with an order of court.

We have not overlooked the third subdivision of section 1055, which declares "a willful disobedience of any process or order lawfully made by the court," a criminal contempt. Conceding that the broadest meaning of that language is to be accepted as that in which the legislature intended it to be received, does it render section 1059 wholly inoperative? Certainly not. There is still left to the court the power to imprison a party indefinitely until he shall have complied with a lawful order made by it.

A sheriff, or other officer of the court, for refusing to obey any lawful order, or to execute any lawful process, may be fined or imprisoned, or both, beyond the limits prescribed by section 1056. It could not have been the purpose to take from the court the power to enforce its lawful order by imprisonment of a party refusing to obey, who had it in his power to comply with it, or to limit such imprisonment to ten days and a fine of \$50; for there are many cases in which a party would cheerfully pay such fine and suffer such imprisonment rather than do the thing commanded.

Such a construction of those sections would utterly

destroy the efficiency of the equity jurisdiction of the court. The order or decree of a chancellor would be a mere will-with-the-wisp—a brutem fulmen, to frighten only those ignorant of its inherent weakness. "Laws without a competent authority to secure their administration from disobedience and contempt, would be vain, nugatory. A power, therefore, in the supreme court of justice to suppress such contempt by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly, we find it exercised as early as the annals of our law extend." 4 Black. Com., 286; State v. Matthews, 37 N. H. 451; Watson v. Williams, 36 Miss. 331; Hurd on Habeas Corpus, 7.

It is not to be supposed, and nothing in the several sections of the statute on the subject warrants the inference that the legislature intended to destroy this inherent power of the court, and the reasonable construction of those provisions is, that the intent was to limit the power of the court as to the extent of the punishment for criminal contempt, as defined in section 1055, leaving the law on the subject, in other respects, as at common law. The order to restore the goods was a lawful order. A willful disobedience of that order was a criminal contempt, which subjected the petitioner to punishment under section 1055, in a proceeding against him as for a criminal contempt.

The order committing him to a common jail until he should have restored the goods in compliance with the order, was not a punishment for contempt, but a lawful means used by the court to enforce a compliance with its order. When imprisonment is designed as a punishment, and not as a means of compelling observance, it must be for a definite term. Rex v. James, 5 B. & Ald. 894; Birkley v. Com., 2 J. J. Marsh. 575; Com. v. Roberts, 2 Clark (Pa.) 349. No statute has prescribed a limit for imprisonment imposed for the purpose of enforcing obedience to its lawful order. Why should there be a limit to the impris-

onment when the order is a lawful order, commanding the party to do what is in his power to perform? Not that a court may imprison him for ten days, or two months, or for any longer or shorter period for the pupose of securing a compliance with its order, but that it may commit him to prison to be held there until he shall have obeyed the order.

The prisoner has no occasion in such a case to apply to the courts for his discharge. He has it in his power to obtain it by doing what he should and has the power to do. If he should be released he would still be in contempt of court, and continue in contempt until his compliance with the order. Imprisonment for contempt of court, in violating its order, and not to enforce a compliance with any order, but only to vindicate the authority of the courts, stands upon a different ground, and is regulated by sections 1055 and 1056.

Section 3118 of the Revised Statutes, limiting all punishments by virtue of the common law to a fine of \$100 and imprisonment for two months, has application only to crimes and misdemeanors, besides, as above stated, the imprisonment for the purpose of enforcing an order, is not imprisonment as a means of punishment.

In this case an ex parte injunction order was made, which was disobeyed. The next day an order was duly made, commanding the petitioner to restore the goods, which was likewise disobeyed; and in its order or judgment the court blends together the prisoner's contempt, both in refusing to obey the ex parte injunction order against removing the goods, and his contempt in disobeying the order subsequently made to restore them, and imposes a fine of \$500 upon him, and commits him to prison, to be held there until he should pay the fine and restore the goods.

The petitioner was guilty of two distinct criminal contempts in the disobedience of the several orders, and might have been proceeded against as for criminal contempt in both cases, but the court has no right in making the order

of commitment for the purpose of enforcing its order of restoration to impose a fine or imprisonment, for the contempt of which the prisoner was guilty in the disobedience of either of the said orders. In re Pierce, 44 Wis. 422. For the purpose of enforcing the order to restore the goods, the court properly committed the petitioner, but for what was the \$500 fine imposed? Manifestly for the contempt in disobeying the order, not to secure a return of the goods, because the petitioner was to be confined in jail until he paid the fine and restored the goods. If he should return the goods he must still be held in jail until he paid the fine.

The fine imposed could not, and could not have been designed to, promote the interest of the adverse party in the matter of his right or remedy. Howard v. Durand, 36 Ga. 346; People v. Spalding, 10 Paige 284; 7 Hill 301; and no fine for a criminal contempt can exceed \$50. The fine not only exceeded the amount which the court was authorized to impose, but was imposed in a proceeding not instituted to punish for criminal contempt, and was included in a commitment of the petitioner to jail to enforce his compliance with an order of the court. It was injecting criminal punishment into an order made to secure and enforce civil rights. But the court not only imposed the fine of \$500, but also adjudged that the petitioner pay Holmes \$150, his costs and expenses, and that he stand committed until he restored the property and paid the fine and judgment for costs. Section 16, article 2 of our constitution, declares: "That imprisonment for debt shall not be allowed, except for the non-payment of fines and penalties prescribed by law." It was held In the matter of Watson, 3 Lans. 413; People v. Spalding, 10 Paige 284; s. c., 7 Hill 301, that: "When a defendant is ordered to pay a sum of money it becomes a debt, and the precept to commit him is in the nature of a capias ad satisfaciendum, and he may be discharged under the insolvent laws," but otherwise where a

fine is imposed for a willful contempt in violating an injunction, or for other criminal conduct of like nature.

In the Matter of John C. Rhodes, 65 N. C. 518, the court said: "We know of no law by which a judge can direct a fine for contempt of his court, to be paid to a party to the suit."

The money which the petitioner was ordered to pay Holmes, was an adjudication that costs and expenses in curred by Holmes in the proceeding, should be paid to him by the petitioner. It was a judgment, and whether valid or invalid, is not a matter of any consequence, for, if a valid judgment, it is a debt of record for which the prisoner cannot be imprisoned, and, if invalid, the imprisonment on that account is illegal.

In Coughlin v. Ehlert, 39 Mo. 285, it was held that since the abolition of imprisonment for debt in this State, "a party cannot be imprisoned for contempt of court for refusing to obey an order or decree directing the mere payment of money." See also Roberts v. Stoner, 18 Mo. 484.

In re Blair, 4 Wis. 522, it was held that the constitutional provisions against imprisonment for debt, must have the effect of rendering void any order or judgment ordering imprisonment for debt.

Notwithstanding these errors in the proceeding of the court, we cannot discharge the prisoner, since the order for his commitment, until he shall have obeyed the order to restore the goods, was a legitimate exercise of the power of the court. Neither this nor any other court can, on a petition for a habeas corpus, discharge the prisoner for a mere irregularity in the proceedings. It must be for an illegality which renders the commitment void. Hurd on Habeas Corpus, 327. Here the court had jurisdiction, and the imprisonment of the petitioner until he should comply with the order of the court, was warranted by law. After he shall have restored the goods the prisoner will be entitled to his discharge, the other requirements of the judgment

being nullities. Feeley's case, 12 Cush. 598; People v. Markham, 7 Cal. 208.

The prayer of the petitioner, that he be discharged, is refused. All concur, except Sherwood, J., who concurs in the construction of the several sections of the statutes, but holds that section 1056, limiting the power of the court in the punishment of criminal contempt, to be unconstitutional, as an invasion by the legislature of the domain of the judiciary.

Brown v. The Chicago & Alton Railroad Company, Appellant.

- Negligence in Constructing Dam: DAMAGES: PLEADING. In an action for alleged special damages to plaintiff, occasioned by overflow of water on his land caused by defendant's negligence in constructing a dam, damages for injuries to the land itself, and as to which the petition contains no averment, connot be recovered.
- 2. : SICKNESS IN PLAINTIFF'S FAMILY: DAMAGES. Sickness in plaintiff's family, caused by such overflow of water from defendant's negligently constructed dam, is a proper element of damages where the same is pleaded in the petition.

Appeal from Audrain Circuit Court.—Hon. Elijah Robinson, Judge.

REVERSED.

Mcfarlane & Trimble for appellant.

Plaintiff's fourth instruction was erroncous in assuming the dam caused the overflow, and in directing the jury to assess damages for injury to the land itself, and also to its rental value. Revised Statutes, section 788, provides a special remedy for the permanent injury to the land, which excludes all others, and any instruction that plaintiff was entitled to damages for such permanent injury, was im-

proper. 1 Sutherland on Damages, 202; Sedgwick on Damages, 162; Wood on Nuisances, § 856. The rule for the measure of damages, as stated in the instruction, was erroneous. 3 Sutherland on Damages, 417; Kemper v. Louisville. 14 Bush 87; Francis v. Schoelkuff, 53 N. Y. 152; Pinney v. Berry, 61 Mo. 361. Defendant had a right to an independent trial of the fact whether the maintenance of the dam produced the sickness. 3 Sutherland on Damages, 417; Wood on Nuisances, §§ 495, 496, 497; Illinois Central R. R. Co. v. Grabil, 50 Ill. 241; Hutchins v. Smith, 63 Barb. 252.

T. B. Buckner for respondent.

Sickness causing a nuisance, is an element of special damages when it is averred. Ellis v. Railroad Co., 63 Mo. 131; Story v. Hammond, 4 Ohio 376; Keerney v. Farrill, 28 Conn. 317; Mills v. Hall, 9 Wend. 315; Wood on Nuisances, § 724; Pinney v. Berry, 61 Mo. 359. The case was fairly submitted to the jury, and the verdict should not be disturbed.

Ewing, C.—The respondent owned a farm about one mile above the point where the appellant's line of railroad crosses Beaver Dam fork of Salt River, at which place appellant had erected a dam for the purpose of procuring water for the use of its road.

Respondent, in August, 1880, commenced a suit in the Audrain circuit court for damages, charging that appellant so negligently and carelessly constructed said dam as to cause the creek to back up and overflow respondent's farm, and cause the damage complained of; and alleged as special damages, that grasses were destroyed, trees killed, the land rendered useless for cultivation or grazing purposes, floating off logs, timber and rails, depositing debris and drifting trush on said lands, cutting off plaintiff's outlet to other lands, destroying roads and fords and crossings, and ren-

dering the stream impassible, destroying a valuable sandbank which had been theretofore a source of revenue, diminishing the rental value of said land one-half, and causing sickness in plaintiff's family, whereby he was damaged \$2,000.

The defendant answered, alleging existence as a railroad corporation; that it erected the dam for railroad purposes under the law, and did so in a careful and skillful manner.

Plaintiff offered evidence tending to prove the allegations in the petition, and also that the dam caused the overflow. The defendant offered evidence tending to prove that there was an exceedingly heavy rain, and a general overflow, that the top of the dam was several feet below the lowest part of plaintiff's land, and that the back-water from the dam did not make the creek water come to the top of the banks anywhere, and that the dam cannot cause the water to overflow plaintiff's land "as long as water continues to seek a level."

Among others, the court gave the following instruction for the plaintiff, against the objection of the defendant:

4. In assessing the damages the jury will take into consideration all injuries which they shall believe from the evidence was caused by said dam, back-water and overflow to plaintiff's land, including all injuries to grasses, trees, standing and being on said land, and injuries to the land itself, and for logs and rails floated off, and for injuries to roads and passways on plaintiff's land crossing said stream, and by injuries done by cutting off one portion of plaintiff's land from another, and for injuries to a sand-bank or sand-banks on plaintiff's land, and injuries to rental value of said land caused by said back-water and overflow of said land, and the same becoming sickly, and for injury to the health of plaintiff's family.

This instruction is objectionable for more reasons than one. All the damages claimed by plaintiff are special, and the instruction must be confined to the pleading. A party

cannot be permitted to sue for one thing, and submit other questions to the consideration of the jury. This instruction, after submitting to the jury all the questions as to special damages asked in the petition, then submits that in assessing damages they shall take into consideration "injuries to the land itself," concerning which there is no allegation and prayer in the petition. Glass v. Gelvin, ante, p. 297; Benson v. C. & A. R. R. Co., 78 Mo. 504; Bank v. Armstrong, 62 Mo. 59; Moffatt v. Conklin, 35 Mo. 453; Bank v. Murdock & Armstrong, 62 Mo. 70. This instruction not only submits to the jury the question of "injury to the land itself," but also "injuries to the rental value" thereof. It assumes that injuries were caused by back-water and overflow, regardless of the question whether the dam caused the back-water and overflow. It also submits, in addition all questions of special damage alleged in the petition, and is so drawn as to make its meaning ambiguous and misleading.

Plaintiff seeks to recover for alleged special damage. The measure of damages in such a case as this cannot be the difference in value of the land before and after the injury, and the difference in rental value also, before and after the injury. But must be the injury actually sustained at the commencement of the suit. Shearman & Redfield on Negligence, section 602, lays down this rule: "In an action for a negligent injury to real estate, the rule of damages generally adopted, is to allow the plaintiff the difference between the market value of the land immediately before the injury occurred, and the like value immediately after the injury is complete." But in Pinney v. Berry, 61 Mo. 359, Napton, J., said: "But it is obvious that this rule has no application to such nuisances as may be removed the day after the verdict, or for the continuance of which a second or third action may be maintained, or which may be abated at the instance of the injured party, by the order of a competent court." The suit at bar is for alleged special damages, and the measure of damage is compensation

for the loss actually sustained prior to the suit, by reason of the alleged negligence and carelessness of the defendant.

The court below did not err in refusing the fifth instruction asked by the defendant. The sickness of plaintiff's family is alleged in the petition as a cause of damage, which is a legitimate and proper instruction for the jury. Ellis v. K. C., St. J. & C. B. R. R. Co., 63 Mo. 131; Pinney v. Berry, 61 Mo. 359.

For the error in giving the fourth instruction asked by the plaintiff, the judgment of the circuit court is reversed and the cause remanded. All concurring

LORING et al. v. THE CITY OF ST. LOUIS, Appellant.

Taxes: ILLEGAL COLLECTION: CONTRACT. The county collector of St. Louis county illegally collected interest on taxes, and delivered the same to the county under a contract with the latter to hold it in trust until his right to collect had been judicially determined; pending which a separation of the county and the city of St. Louis was had, and the county paid the fund to the city, to be held on the same trust. Held, that the city was liable therefor to the tax-payers, and that this was the case, notwithstanding there was a clause in the contract between the collector and the county, to the effect that the contract gave no tax-payer the right to sue the county for his share of said fund.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Leverett Bell for appellant.

The respondents, by pleading the contract between Maguire and St. Louis county, and setting it up as the foundation of their right to recover herein, have in effect made themselves parties to it, and it is to be construed, for the purposes of this action, as if they had in effect executed

it and bound themselves by its terms and provisions, which preclude them from maintaining this action. No debt was created or exists by reason of the matter stated in the petition, on which plaintiffs are entitled to recover in this action against the defendant. The order made by the county on February 12th, 1877, awarding to plaintiffs the money sued for is invalid.

Loring & Loring for respondents.

It has been judicially determined by this court that the money in controversy was wrongfully exacted by Maguire from the tax-payers. Maguire v. State Saving Asso'n, 62 Mo. 344. The petition traces the money from the tax-payers through Maguire and the county of St. Louis to defendant, which now holds it in its treasury. The same liability rests upon the defendant as upon an individual to pay the money in dispute to plaintiffs. Pimental v. San Francisco, 21 Cal. 364; 16 Cal. 591; Herzo v. San Francisco, 33 Cal. 134. The contract between Maguire and the county does not preclude plaintiffs from bringing this suit; it was referred to in the petition to give a history of the case, and by so doing plaintiffs did not adopt it; they were not parties to it.

PHILIPS, C.—This action grew out of the following state of facts: In 1871 one Constantine Maguire was collector for the county of St. Louis. Under certain tax-bills against personal property, the collector wrongfully exacted of the owners of the property interest on the bills of assessment, and under compulsion collected thereon interest amounting to about \$25,000. Of this fund thus wrongfully collected, the sum of \$717.94 was taken from the parties represented in the pending suit.

On demand made by the county court of said county, that the fund so collected by the collector be paid over to the county, the State Savings Bank Association, one of the parties from whom a part of this fund had been exacted,

made claim on the collector for restitution, as for money had and received to its use. Thereupon Maguire filed his petition, bringing the county and Savings Association into court, to have the matter judicially determined as to whom he should pay over the money.

That cause was carried to the Supreme Court for final determination. During the pendency of that action, as its result could not be known, for the protection of the collector, and the better security of the county in the event it should be determined by the court that the money was rightfully collected, on the 26th day of May, 1873, the county court of said county and Maguire, entered into the following contract:

"Constantine Maguire will pay into the county court of St. Louis county, the sum found by said court's committee to have been collected by him as interest on delinquent personal tax-bills, viz., \$25,159.34, less the amount of said interest involved in the suit of the State Savings Institution against him, now pending in the St. Louis circuit court, (and which amount is to be by him paid into said circuit court, to abide the decision on his interpleader in reference thereto against said association and said county court,) and also less the amount which said county court may allow said Maguire for expenses incurred in relation exclusively to the collection of said delinquent personal tax-bills, and which expenses are by law, or under any order of said county court lawfully chargeable to said county, or to be refunded to said Maguire by it. On the balance thus ascertained as to be paid by him, he shall also pay into said county court at the same time with the principal, interest thereon at the rate of six per centum per annum from the 22d of October, 1872, being the date of the service on him of the order of said county court, that he render an account of said interest collected on delinquent personal tax-bills. Said Maguire will, without delay, present to the county auditor all his claims for allowance or reimbursement of said expenses, and said county court will, without unneces-

sary delay, proceed to pass upon the same according to law, and only such amount as said court shall allow shall be deducted, as aforesaid, from said interest collected by said Maguire. The balance thus ascertained shall be paid forthwith by him into said county court. But notwithstanding said payment, said Maguire shall be free to appeal, or take his other remedy at law, from the decision of said county court, rejecting any of his said claims; nor shall this agreement refer to any claims he may have against the county of St. Louis, for any expenses of his office as collector, as aforesaid, other than those relating exclusively to said collection of interest on delinquent personal tax-bills. The amount to be paid into said county court by said Maguire, as aforesaid, shall be held by said court as a special fund, to await the determination of the legal questions in relation to the rights to the same, and at the discretion of said court, may be deposited either in the county treasury or in some banking or savings institution of the city of St. Louis, either bearing interest or not, and on adequate security.

2. Should any tax-payer, by suit in good faith and properly defended, or in any suit to which said county court of St. Louis is or shall be a party, recover from said Maguire any money paid him as interest on delinquent personal taxbills, said county court shall repay to said Maguire, out of the fund paid by him, as aforesaid, a sum of money which shall bear to the total of said fund the same proportion that said interest originally collected by him, and the subject of such suit, may bear to the total of such interest collected by him, and ascertained by said county court's committee, as hereinbefore set forth; the remainder of such judgment, whether of original demand, principal or interest or cost, shall be paid by said Maguire without recourse on said county court, or of said county of St. Louis.

3. Any payment by said county court out of said fund to any tax-payer, by virtue of any act of the general assembly of the State of Missouri, now in force or hereafter enacted, or in accordance with a decision of the Supreme

Court of Missouri, settling the question of right to interest on delinquent personal tax-bills, of such tax-payers' proportion of said fund, shall be a satisfaction pro tanto of all obligations and trusts assumed by said county court in regard to said fund. But nothing in this agreement contained shall be construed to give any tax-payer any right to sue said county court, or the county of St. Louis, for any part of said fund, or to obligate said court for said county, to defend any suit brought against said Maguire on account of any collection by him of interest on delinquent personal tax-bills, or to indemnify him against any judgment therein.

4. Nothing in this agreement shall be construed to hinder said county court, or the county of St. Louis, to refund to said Maguire, or to pay to tax-payers who may be entitled to return of interest collected on delinquent personal tax-bills, or to pay to the State of Missouri, or any corporation or body, or person whosoever in the aggregate, any greater amount than that to be paid as aforesaid, by said Maguire into said county court; but as soon as said fund, so paid in by him, shall have been exhausted by such payments or transfers to the revenue of the county of St. Louis of proper proportion of said fund, said county court and said county of St. Louis shall be wholly free from all further liability, trust or duty under this agreement; and should it hereafter appear that any other or greater amount than that heretofore mentioned, as ascertained by a committee of said county court, has been collected by said Maguire as interest on delinquent personal tax-bills, this agreement shall not be construed to apply to any such hereafter ascertained excess, but said county and said county court, and all other parties and persons whatever, shall have in relation thereto the same rights and remedies as if this agreement had never been made.

5. The proceedings now pending on notices by the county of St. Louis to said Maguire, of motions to be made at the next term of the St. Louis circuit court, shall be dismissed on his paying all costs and expenses thereof, as soon

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as he shall have paid into said county court the funds hereinbefore mentioned, and he assents and engages to procure the assent of the sureties on his official bonds to the continuance of said motions meanwhile."

The money was accordingly paid over to the county by Maguire. The suit of Maguire v. The Savings Association, was decided by the Supreme Court in favor of the association. 62 Mo. 344. After the adoption of "The Scheme and Charter," which took effect October 21st, 1876, the city of St. Louis thereby assumed the existing county indebtedness; and on July 31st, 1877, adopted the following ordinance:

"Section 1. The mayor is hereby authorized and directed to confer with the county court of St. Louis, as now organized under the scheme, and to enter into an agreement on behalf of the city with said county authorities for the division between the said city and county, of the balance of all funds and assets in the hands of Herman Rechtien, late county treasurer, which, under section 13 of the scheme, he is required to pay into the city treasury and county treasury respectively, which agreement shall be binding on the city of St. Louis.

Section 2. For the purpose of facilitating a settlement of the balance due to the city, and hastening the payment thereof into the city treasury an emergency exists; therefore this ordinance shall take effect and be in force

from and after its passage."

The county had kept said fund deposited as "The Constantine Maguire fund" in the county treasury. And on the 12th day of February, 1877, the county court made an order that there be paid to plaintiffs, for the tax-payers aforesaid named in this action, sixty per cent of their claim, amounting to the sum of \$430.50, which sum plaintiffs demanded of the county treasurer, but was refused payment. After the adoption of the ordinance aforesaid, by the city, the funds in the county treasury were divided between the county and the city, by which "the Constantine Maguire

fund," amounting to \$6,621.68, was paid over to the city of St. Louis, and is now so held by it. Maguire became insolvent, and the plaintiffs demanded of the city the said sum of \$430.50, which being refused, this action was brought to recover the same.

The petition substantially sets up the preceding facts, and seeks judgment against the city for the said sum of \$430.50, with interest, etc. To this petition the defendant demurred. The circuit court sustained the demurrer, and the plaintiffs appealed to the court of appeals, where the judgment of the circuit court was reversed. From this decision of the court of appeals, the defendant has appealed to this court.

I. We consider the opinion of the court of appeals in this case, as quite decisive of all the questions raised on this appeal. It is only out of respect for the earnestness with which the appellant re-argues the points made against the sufficiency of the petition, that we reproduce the argument of the court of appeals, with such additional suggestions as occur to us to be equally decisive of the merits of the case.

The first ground assigned against the validity of the petition, is the following provision occurring in the agreement between the county and Maguire: "But nothing in this agreement contained, shall be construed to give any tax-payer any right to sue said county court, or the county of St. Louis, for any part of said fund, or to obligate said court of said county to defend any suit brought against said Maguire, on account of any collection by him of interest on delinquent personal tax-bills, or to indemnify him against any judgment therein."

The argument made by appellant's counsel is, that the plaintiffs, by pleading the contract, have, in effect, made themselves parties to it, and adopt its conditions; and, therefore, they cannot maintain this action.

There is plausibility in this, but it is not tenable in this action. The contract was a part of the history of the case,

one of the facts in the statement of the cause of action, to show that the county court obtained the fund from the wrong-doer with full knowledge of the circumstances under which Maguire took it. If, as a matter of equity, the fund was affected with a trust for the benefit of the wronged tax-payers, it was not in the power of the trespasser and his privy by compact, solely between themselves, to preclude the rightful owner from following it into the hands of the voluntary transferee. If the law were otherwise, how easy it would be for such volunteer to avail himself of goods tortiously taken, by stipulating with the tort-feasor that the party despoiled should have no right to reclaim his property from the mere depositary.

In the case of Maguire v. State Savings Asso'n, supra, this court decided that the money exacted by Maguire was tortiously taken, and the act was moral duress at least. As such, it was a fraud in law. A court of equity will create a constructive trust in such cases. 1 Perry on Trusts, §§ 166, 169, 170; Story Eq. Jurisp., § 187. "The leading principle of this remedial justice is by way of equitable construction to convert the fraudulent holder of property into a trustee, and to preserve the property itself as a fund for the purpose of recompense." The difficulty in this case of pursuing the particular fund, on account of the usual inability to identify money, is obviated by the allegation of the petition that it has been preserved by the trustee as "the Constantine Maguire fund." The defendant has it in kind.

True it is, that the county could not have been made responsible to the tax-payers for the act of the collector as its agent, without more. It would also be inaccurate to say the county could be held answerable as in the case of a ratification by the principal of the unauthorized act of the regent. For the doctrine of the maxim, omnis ratihabitio retrotrahitur, etc., does not apply to the instance where the principal would not himself have had the lawful right to do the act which he ratifies. Story on Agency, (8 Ed.) note 2, p. 299; McCracken v. City of San Francisco, 16 Cal.

But when the county took from the collector the money, it created a privity between them, and held the fund charged with the same trust which affected it in the hands of Maguire. It was on this principle, in effect, that the supreme court of California, in the case of Pimental v. City of San Francisco, 21 Cal. 365, and Herzo v. City of San Francisco, 33 Cal. 134, held the city bound. The officers of the city, without due warrant, undertook to sell certain real estate of the city, and received large sums of money therefor. The sales were held void for lack of power in the officers to sell in the manner attempted. On suits by the purchasers against the city to recover back this money, it was held that the acts of the officers were only those of assumed agents, and as such, it was not binding on the city. And even had the agents paid the money over to the city treasurer, who, without direction from the municipal government, covered the same into the city treasury, that would not have sufficed to render the city liable. "As she was not responsible for its being in the treasury, she would not be accountable for it to the purchaser, until she had exercised dominion over it, treating it as her own." The city was held bound, because she had received the money as such city, and assumed to control it. C. J. Field said: "We do not appreciate the morality which denies, in such cases, any rights to the individual whose money or other property has been thus appropriated. The city cannot appropriate to her own use the property of others, and screen herself from responsibility upon the pretence of excessive indebtedness. The city has obtained it and used it, and she is legally, as she is morally, bound to refund to him (the plaintiff')."

In the case at bar the money was covered into the county treasury by the express agreement, and at the instance of the county court, and into the city treasury pursuant to an express ordinance of the city government, and under claim of devolution of right by operation of the "Scheme and Charter." To this money it has no right.

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It got it without consideration to the rightful owner, and with full knowledge of its wrongful exaction.

We do not deem it important to discuss the other points suggested by counsel, touching imputed defects and irregularities in the proceedings essentially necessary in ordinary cases, to fix a liability on the treasurer of the county to pay a claim against the county. The failure of the county officials to do the appropriate act to warrant the treasurer to pay over this fund on demand, made of him, could in no manner affect the right of the wronged taxpayer to sue the city for his money. The city holds it as trustee for the owner. The act of the city in demanding this fund of the county, on the ground that it was a debt of the county, passing to the city by virtue of the provision of the "Scheme and Charter," and then, after so receiving it, declining to pay it to the creditor, for the reason that it was not a debt of the county, is as inconsistent as it is indefensible.

The judgment of the court of appeals, reversing the judgment of the circuit court and remanding the cause, is affirmed. All concur.

McIntire, Defendant in Error, v. McIntire.

- Divorce: ALIMONY. A woman can have permanent alimony in this State only as incident to a decree of divorce in her favor.
- Practice in Supreme Court. The Supreme Court will reverse a cause for material error apparent on the face of the record, although no motion in arrest or for review is made in the circuit court.

Error to Holt Circuit Court .- Hon. H. S. Kelley, Judge.

REVERSED.

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Hamilton & Fisher with Daniel Zook for plaintiff in error.

The court exceeded its jurisdiction in allowing alimony to the wife when the decree for the divorce was in favor of the husband. R. S. 1879, §§ 2179, 2180, 2182, 2183; 1 Bishop on Marriage and Divorce, (6 Ed.) § 573; Nucross v. Rogers, 30 Vt. 588; Thorn v. Kuthan, 51 Vt. 520; Gildhall v. Raymond, 1 Strange 647; Williams v. Prince, 3 Stro. 490; 2 Bishop Marriage and Divorce, § 376; Duval v. Duval, 13 Mass. 264; Dean v. Richmond, 5 Pick. 461. A court of equity has no inherent power to decree alimony. 16 Mich. 162; 2 Bishop Marriage and Divorce, § 427. This court will review any order or judgment touching the alimony. R. S., 2184, 2185.

T. C. Dungan for defendant in error.

Martin, C.—The plaintiff sued for a divorce, alleging that the defendant had offered to her such indignities as rendered her condition in life intolerable, also indicating the character of the indignities. The defendant denied the charges against him, and by way of cross-bill asked for a divorce on the ground of cruel and barbarous treatment inflicted upon him by the plaintiff. There is no bill of exceptions in the case, and we are necessarily confined to the record in our review of errors.

The trial resulted in a decree of divorce in favor of the defendant against the plaintiff. It gives the custody of the child to the plaintiff, and concludes as follows: "And the court further orders, adjudges and decrees, that the said plaintiff have judgment for and receive of said defendant the sum of \$1,000 for alimony, and that she have execution against the defendant therefor." This writ of error is prosecuted for the purpose of reversing so much of said decree as adjudges alimony in favor of plaintiff. This is an extraordinary decree, which gives a divorce to the defendant.

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and a judgment for alimony to the plaintiff. The right of the court to adjudge a divorce, as well as to order payment of alimony, is conferred upon it by statute. Permanent alimony can be adjudged only as incident to a decree for a divorce, and then only in favor of the wife when she is the prevailing party. Doyle v. Doyle, 26 Mo. 545; R. S. 1879, § 2180.

How can the decree in this case be justified in face of the statute, which declares that: "In all cases of divorce from the bond of matrimony, the guilty party shall forfeit all rights and claim under and by virtue of the marriage." R. S. 1879. § 2132. Section 2179 was never intended to authorize permanent alimony in favor of the wife, except as incident to a decree of divorce in her favor. She may have alimony pendente lite, which is necessarily before final decree. But this can be given only as incident to the suit and under the provisions of the statute. Under the law as it prevailed in the revision of 1855, alimony pendente lite was accorded to the wife only when she was plaintiff. R. S. 1855, § 8, p. 662. The right of the court to decree alimony pendente lite to her when she was defendant, was denied by the Supreme Court. Morton v. Morton, 33 Mo. On account of this construction of the statute of 1855, the section was subsequently amended so as to authorize an order for alimony pendente lite whether she was plaintiff or defendant. But this clause, as it now reads, has no reference to permanent alimony, which attends a final decree in favor of the wife. Of course a husband has no claim for alimony, however the decree may go.

It does not appear that the defendant made any motion in arrest of the judgment against him, and the question arises whether he can urge in the appellate court the error now assigned by him for reversal. The decisions on this point have not been uniform. It has been laid down in broad terms that a motion in arrest was necessary in order to give the trial court an opportunity to correct its error before resorting to the appellate court. Railroad Co. v.

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Mahoney, 42 Mo. 466; Banks v. Lades, 39 Mo. 406; Haskell v. Sullivan, 31 Mo. 435.

In the case of Richardson v. George, 34 Mo. 104, the Supreme Court refused to reverse or correct a general judgment rendered against a sub-contractor, or against the contractor and the owner of a building for which materials had been furnished by plaintiff, because the motion in arrest did not particularly indicate the error which was necessarily apparent of record. This decision did not please the reporter, and he appended to it a learned note, which has finally prevailed against the decision. In State v. Marshall, 36 Mo. 401, Judge Holmes considers the question and dispenses with the necessity of a motion. In Miller v. Davis, 50 Mo. 572, Judge Adams says: "When a case is brought here without any exceptions or motion in arrest, or for new trial, we can only look at the record proper for errors, and can only reverse for such as are not cured by the statutes of amendments. When the plaintiff, by his own petition, shows that he has no standing in court, and yet obtains a judgment against the defendant, that is an error which this court must entertain, and for which the judgment must be reversed." The question was considered by Judge Wagner in Bateson v. Clark, 37 Mo. 31, and more recently by Judge Sherwood in Sweet v. Maupin, 65 Mo. 65, in which the prior authorities were elaborately reviewed on a motion for a rehearing.

It may be safely asserted that the appellate court will reverse for fatal error apparent on the face of the record, although no motion in arrest or for review has been made, such for instance as that the court has no jurisdiction of the cause or parties, or that the petition fails to state a cause of action. There may be defects and irregularities apparent of record, but the appellate court will not always reverse on account of them. It has refused to reverse for errors of misjoinder of parties and causes of action. Ames v. Gilmore, 59 Mo. 537. When the defects and irregularities do not fall within the designation of material errors, they

cannot be taken advantage of in the appellate court, although patent of record, unless they have been brought to the attention of the trial court by appropriate motion or exception, as the case progressed. Lawther v. Agee, 34 Mo. 373. When a motion in arrest is necessary to bring such defects or irregularities before the appellate court, the motion must be preserved by bill of exceptions. Marquis v. Clark, 64 Mo. 601; Baker v. Loring, 65 Mo. 527; Blunt v. Zink, 55 Mo. 455.

In the present case the error is not only apparent of record, but it is a material one which discloses a judgment in favor of a party who is not entitled to it upon the record made by the pleadings and proceedings in the case. The court having adjudged the divorce in favor of the defendant, had no jurisdiction to render a decree for alimony in favor of plaintiff. This error is palpable, and may be corrected on writ of error. Accordingly it is ordered that the decree be reversed and the cause remanded, with directions to the court below to enter judgment in accordance with this opinion. All concur.

RANNELLS, Appellant, v. GERNER.

- Insane Person, Deed of. The deed of an insane person, after being placed under guardianship, will be absolutely void; and guardianship is conclusive respecting the disability of the ward, whether he be insane or not. And it is immaterial from what cause his in sanity resulted, whether from old age, sickness, habitual drunkenness or other causes whatever.
- 2. ——: ASSENT OF GUARDIAN. The assent of the guardian of an insane person to the latter's deed, confers upon that instrument no element of validity.
- 3. Insane Person, Disposition of Real Estate of. The provisions of the statute for the disposition of the real estate of insane persons, (Wag. Stat., pp. 714, 715, 22 19 to 29, inclusive,) are exclusive of every other method. The proceedings are in rem, binding and af-

fecting no person, except so far as they deprive the owner of his land.

- 4. ——: EVIDENCE OF LUCID INTERVAL: DEED OF. No evidence of a lucid interval is admissible to controvert the insanity of a person after being placed in ward, and non est factum may be pleaded to his deed made after being placed under guardianship and the special matter given in evidence.
- 5. Married Woman: DOWER. A married woman can relinquish her dower in the real estate of her husband, only by "their joint deed, acknowledged and certified" as provided by statute. R. S. 1879, 22 669, 2197. And the wife of an insane person does not relinquish her dower in the land of her husband, sold by his guardian, by joining with her husband in signing the deed thereto. Such deed, so far as the husband's execution of it is concerned, has no legal existence or vitality, he not being the possessor of a sound mind and capable of contracting.
- Estoppels in pais are not applicable to formes covert, except where regarded as femmes sole in consequence of the possession of separate estates.

Appeal from St. Louis Court of Appeals.

REVERSED.

Plaintiff's petition states substantially that she is the widow of Charles S. Rannells, deceased, and that during their marriage he was seized of certain real estate in the city of St. Louis, and the owner thereof in fee simple; that said real estate was conveyed to defendant's grantor in October, 1867, by the guardian of Charles S. Rannells, the said Rannells being in March, 1866, declared to be a person of unsound mind; that plaintiff never relinquished her dower in said premises, and that she has been wrongfully deprived and deforced thereof by defendant and his grantor, and prays that she may be seized of her dower and allowed \$200 damages.

Defendant's answer admits the allegations of the petition, except that Charles S. Rannells was, in March, 1866, declared to be of unsound mind, and that plaintiff, as his widow, is entitled to dower in the premises in question. The remainder of the answer necessary to an understanding

of the questions decided, avers in substance that Charles S. Rannells, in March, 1866, was duly found incapable of managing his own affairs, because of habitual drunkenness, that a guardian was appointed for him; that the guardian, in October, 1867, sold the premises described; that it was announced to the bidders at the sale that the same would be as effectual as if made by Charles S. Rannells, himself, and that plaintiff would join with her husband in the deed for the purpose of relinquishing her dower in the premises sold; that these announcements were made with plaintiff's knowledge and consent. That the deed was executed by the guardian of Charles S. Rannells, and by said Rannells and his wife, the plaintiff, the said Rannells having a lucid interval on that day, and that the deed was acknowledged by Charles S. Rannells and plaintiff, his wife, in the usual manner. It is further averred in the answer, that the full consideration, \$1,335, was paid for said premises, and that plaintiff has had the use and benefit thereof, or a part of the same, and that it is inequitable and unjust in her to claim dower in said land, and that she ought to be held to be estopped from so doing.

Plaintiff moved in the circuit court that judgment be entered in her favor upon defendant's answer, which was done. Defendant appealed to the St. Louis court of appeals, where that judgment was reversed, and plaintiff appealed

to this court.

George A. Castleman with Andrew Mackay, Jr., and Julian J. Laughlin appellant.

A femme covert can convey her estate and relinquish her inchoate right of dower only in the manner provided by statute. R. S., §§ 669, 678, 680; Hill v. West, 8 Ohio 226; Martin v. Dwelly, 6 Wend. 9. As a general rule the deed of a femme covert, unless joined by her husband, or authorized by statute, in respect to her sole property, is void. Washb. on Real Prop., (4Ed.) 224, 248; 2 Kent's

Com., 168; 2 Bla. Com., 293; Lowell v. Daniels, 2 Gray 161; Baxter v. Bodkin, 25 Ind. 172; Bressler v. Kent, 61 Ill. 426; Moore v. Tuesdale, 5 B. Mon. 356. Neither married women nor infants can estop themselves, either by covenant or by matter in pais. Bemis v. Call, 10 Allen 512; Big. on Estop., 485; Drury v. Foster, 3 Wall. 34; Morrison v. Wilson, 13 Cal. 494; Rangely v. Spring, 21 Mo. 130; Jackson v. Vanderhayden, 17 Johns. 167; Hempstead v. Eastin, 33 Mo. 142. A deed made by a person of unsound mind, who has for that reason been placed under guardianship, will be void. And the same is true of a person under guardianship for incapacity to manage his affairs, though not in fact insane, even though with the approbation of his guardian. Wash. on Real Prop., 224, b. 3, chap. 4, 51, § 14, and note; Imhoff v. Butler, 31 Pa. St. 243. A femme covert is not estopped by the covenant of her deed, except so far as being executed in accordance with law, it passes her title, and she may claim a subsequently acquired title against the covenant. Jackson v. Stevens, 16 Johns. 110; Urguart v. Clarke, 2 Rand. 549; Chauvin v. Wagner, 18 Mo. 551. The alienation of real estate by the husband, whether voluntary, or by deed or will, or involuntary as by proceedings against him, or otherwise, will confer no title on the alienee as against the wife in respect to her dower. Grady v. McConkle, 57 Mo. 172. The extinguishment of the right of dower in a deed which conveys no title to lands, will not pass the right of dower as a separate substantive estate. Douglass r. McCoy, 5 Ohio 522. A wife who has released her dower in a conveyance which is afterward set aside as fraudulent as to creditors, is not thereby estopped from claiming dower as against such creditors. Lowry v. Fisher, 2 Bush. 70; Robinson v. Bates, 3 Met. 40; Maloney v. Horan, 53 Barb. 29.

Lucien Eaton with M. L. Gray and Jacob Klein for respondent.

The deed made by the guardian in conformity to law

and joined in by C. S. Rannells and plaintiff, being acknowledged in due form, released and barred plaintiff's inchoate right of dower. The husband was not insane, but incapable of managing his affairs from habitual drunkenness. His contract was not void. Darby v. Cabanne, 1 Mo. App. 126; Lewis v. Jones, 50 Barb. 670. But our statutes cover the case. 1 Wag. Stat., 715, §§ 30, 32; Ib., 54, § 13; Rannells v. Gehner, 9 Mo. App. 506; Lee v. Lindell, 22 Mo. 202. There is a complete equitable estoppel in pais. The legal effect of the answer is to charge plaintiff with claiming dower in the face of her own fraud. Coverture is not a weapon for fraud in intent or result; it is only a shield for the protection of the weak. 1 Story's Eq., § 385; Big. on Estop., 488, and cases cited; Cord on Mar. Wom., § 24; Savage v. Foster, 9 Modern 35; Beckett v. Cordley, 1 Brown Ch. 357; Schwartz v. Sanders, 46 Ill. 18; Wright v. Arnold, 14 B. Mon. 638; Drake v. Glover, 30 Ala. 390; Malony v. Horan, 53 Barb. 29, 40; Dann v. Cudney, 13 Mich. 239; Bien v. Heath, 6 How. (U.S.) 238, 248. The rule applied to infants should be applied to married women. Let them at least refund their ill-gotten gains. Kerr v. Bell, 44 Mo. 120; Baker v. Kennett, 54 Mo. 82; Sweany v. Mallory, 62 Mo. 485. A married woman's covenants so far estop her that she cannot assert claims that repudiate those Hill v. West, 8 Ohio 222; Collard v. Swan, 7 Mass. 291; Massie v. Sebastian, 4 Bibb 433; Connolly v. Branstler, 3 Ky. 702; McCullough v. Wilson, 21 Pa. St. 436; Drake v. Glover, 30 Ala. 382.

Sherwood, J.—The deed of a non-sane person, after being placed under guardianship, will be absolutely void. Tiedman Real Prop., § 792; Wait v. Maxwell, 5 Pick. 217; Pearl v. McDowell, 3 J. J. Marsh 658; Griswold v. Butler, 3 Conn. 227; Martindale Law Convey., §§ 26, 311; White v. Palmer, 4 Mass 147; Ingraham v. Baldwin, 9 N. Y. 45; Wilcox v. Fitzhugh, 12 Barb. 235. And guardianship is conclusive respecting the disability of the ward. Wadsworth

v. Sherman, 14 Barb. 169; Leonard v. Leonard, 14 Pick. 280; White v. Palmer, supra; McDonald v. Morton, 1 Mass. 543. And the same rule holds whether the person placed in the care of a guardian is insane or not. It is sufficient that the inquisition finds him to be of unsound mind and incapable of managing his own affairs, in consequence of habitual drunkenness. 14 Barb., supra. Although neither an idiot nor a lunatic, the person in ward is dealt with as if of that character, whether his incapacity result from old age, sickness or other cause whatever. The putting him in the control of a guardian, is in the nature of a commission on the writ of de lunatico inquirendo. Barker's case, 2 Johns. Ch. 232; Gibson v. Jeyes, 6 Ves. 273; Ridgeway v. Darwin, 8 Ves. 65; Ex parte Cranmer, 12 Ves. 445; Imhoff v. Witmer, 31 Pa. St. 243; 3 Washb. Real Prop., 248. And the assent of the guardian of such incapacitated person to the latter's deed, confers on that instrument no element of validity. Griswold v. Butler, 3 Conn. 231.

In the case at bar no distinction is to be taken between the circumstances which gave origin to Rannells, the husband, being placed under guardianship, and those of an ordinary inquisition of lunacy. The authorities cited and our statutes recognize no difference between a person incapacitated on account of habitual drunkenness, and incapacitated from any other cause. 1 Wag. Stat., pp. 712, 718, §§ 1, 52.

In Imhoff v. Witmer, supra, where the obligor of the bond in suit had been found and decreed an habitual drunkard, five years prior to the execution of such bond, and a committee appointed to take charge of his estate, the supreme court of Pennsylvania say: "The object of the statute was protection and guardianship over the persons and estates of parties wanting capacity to take proper care of either, and to preserve the property of such from being squandered, or imprudently used to their own injury and that of their families, if they have any. It is not necessary to adduce reasons to prove the self-evident proposition, that

to admit the capacity of control to exist in the lunatic or habitual drunkard over his estate, after inquisition settling his condition in this respect, or submit it to be controverted by evidence of lucid intervals or sobriety at the moment of contracting, would leave the estates of these unfortunate classes about as much exposed as before proceedings had in regard to them. The inquisition and decree standing of record, was intended for notice to all the world of the incapacity of the particular party to contract. It is the judgment of the law to this effect, and as a consequence, his acts in regard to his property are absolutely void while the condition exists. He can make no contract that will bind or render it liable to take effect, either in his lifetime or after death, for the reason that the law has settled that the important element of a valid contract does not exist, namely, the capacity to contract."

The statute to which reference has been already made, makes provision full and complete for the sale of the real estate of the person in ward. 1 Wag. Stat., pp. 714, 715, §§ 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29. These statutory provisions must be regarded as exclusive of every and any other mode of disposition of the ward's real estate, and of strictly prohibiting any other method of disposition of it from being adopted, and this in accordance with the maxim expressio unius, etc. But it is said that section 32, of the same chapter, impliedly recognizes a contract of sale by the ward of his land where it meets with the approbation of his guardian. This section will not bear such a construction; for to construe it thus would be to render valueless the preceding provisions of the statute which particularly prescribe the means to be employed, and measures to be taken, in order to an effectual sale of the ward's land. Why go through that lengthy, formal and expensive process if the adjudged lunatic, by a little private dealing on his own account, could, with his guardian's approbation, sell his own land and make his own deed? Was it not the very object of the guardianship, the humane purpose of the law which

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authorized it, that the ward incapacitated by age, by mental weakness, by dissipation, or other cause whatsoever, should be precluded from managing those affairs which a jury, under the direction of the court, had found and declared him incapable of managing? Is it not altogether inconceivable that the legislature, after having provided the method whereby a person should be adjudged insane, and a guardian appointed for him; after having provided specific means whereby the land of such person should be sold, and a deed therefor made by the guardian, that in a subsequent and almost contiguous section, they should give the adjudged lunatic carte blanche to make his own contracts of sale of his land, needing only his guardian's consent in order to make them in every way effectual? Is it not a very singular law, to be sure, which, because of mental incapacity, takes away a man's control of his person and of his property, and after providing methods for selling that property and the making a deed therefor by a legal custodian, should yet turn the poor drivelling incapable into the streets, to hunt up purchasers, strike bargains, sign contracts, and execute deeds? It seems too plain for discussion that no such construction can reasonably be put upon the section under consideration.

If it be asked what is the proper construction to be given to that section, it may be replied, that in one point of view it may be held to be but declaratory of the common law disability of one non compos to make any contract. Or it may relate to personal property; property which may have been disposed of by the ward anterior or subsequent to office found. Either of these views would certainly better consist with the other sections of the statute; and the rule is, if possible, to make the whole of the statute stand, and to give meaning, force and effect to all of the sections. But it is said that as section 30, of the same chapter, provides that "every conveyance made under the order of the county court pursuant to the provisions of this chapter, shall be as valid and as effectual as if the same had been

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executed by such insane person when of sound memory and understanding," that this section puts the validity of the deed beyond doubt as a conveyance of the wife's dower, she having joined in the execution of such deed.

When a sale takes place of a man's land under ordinary fi. fa., the sheriff is regarded as his agent, and the law implies, and will not allow it to be gainsaid, that the conveyance is "as valid and effectual as if the same had been executed" by the execution defendant. So that it may be said of such a deed, as is said elsewhere, that "when the wife joins in such a conveyance, she joins in a deed which is none the less her husband's in fact and in effect, because executed through an agency appointed by law." But though this be the case, no one has ever yet accumulated a sufficient stock of temerity to assert that since the sheriff's deed was "as valid and as effectual as if the same had been executed by such defendant, therefore the wife of the defendant might relinquish her dower by joining the sheriff in the execution of such deed. And yet the two cases are precisely parallel. If the wife could not relinquish her dower by joining in the execution of the sheriff's deed, no more could she thus relinquish by joining in that of the guardian.

The steps taken by a guardian of an insane person for the sale of the land of the latter, are proceedings in rem, binding no person and effecting no person, only so far as they deprive the owner of his land. They are no more binding beyond this purpose which they accomplish, than are administration proceedings for the sale of land for the payment af debts binding on the mouldy corpse of the decedent. In the latter case the deed executed by the administrator conveys to the purchaser "all the right, title and interest which the deceased" had in the land; in the former case the deed of the guardian, conveying the land of his ward, does but convey the right, title and interest of his ward in the land, and can convey no more. In neither statute, whether that respecting ordinary administration,

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that regarding insane persons, or that in respect to sales under execution, is the slightest intimation given that it is expected or will be either opportune, or appropriate, or lawful, for the widow or wife to join in the deed of administrator, sheriff or guardian.

The legislature has provided but one mode whereby a married woman may relinquish her dower in the real estate of her husband, and that is "by their joint deed, acknowledged and certified," etc. 1 R. S. 1879, § 669; Ib., § 2197. But as the deed of a non-sane man, executed after his being put in ward, is conclusively presumed to be void: as no evidence is admissible of a lucid interval to controvert the adjudication had in his case; (Imhoff v. Witmer; Leonard v. Leonard, and other cases, supra;) as non est factum may be pleaded to the deed and the special matter given in evidence, (Yates v. Boen, 2 Strange 1104; Dexter v. Hall, 15 Wall. 9, and cases cited,) it can but follow that the plaintiff never relinquished her dower in the land sold by her husband's guardian, for the self-evident reason that the instrument which her husband went through the dumb show of singing, and which she signed also, was not and could not be his act, deed or conveyance, never, so far as his execution of it was concerned, having had any "legal existence or vitality." Van Deuson v. Sweet, 51 N. Y. 378. The very term, "their joint deed," necessarily imports and implies that the husband, as well as the wife, should be the possessor of a "sound mind capable of contracting." Leggate v. Clark, 111 Mass. 308.

It only remains to say, respecting the equitable subject matter of defendant's answer, that it is the established law of this State, that estoppels in pais are not applicable to femmes covert, except where regarded as femmes sole, in consequence of possessing separate estates. Hord v. Taubman, 79 Mo. 101; Meier v. Blume, ante, p. 179; Mueller v. Kaessman, decided present term: Bagby v. Emberson, 79 Mo. 139; Atkison v. Henry, ante, p. 151; Shroyer v. Nickell, 55 Mo. 264; Whitely v. Stewart, 63 Mo. 360; Hempstead v. Easton,

33 Mo. 142. And the same view taken by this court respecting this matter, is generally taken elsewhere. Lowell v. Daniels, 2 Gray 161; Glidden v. Strupler, 52 Pa. St. 400; Morrison v. Wilson, 13 Cal. 494; Martin v. Dwelly, 6 Wend. 9; Butler v. Buckinham, 5 Conn. 492; Martin v. Mitchell, 2 Jac. & Walk. 424; 7 Cent. Law Jour. 182; Drury v. Foster, 2 Wall. 24. The cases of McCullough v. Wilson, 21 Pa. St. 436, and Drake v. Glover, 30 Ala. 382, are cases respecting separate estates, and consequently can have no bearing on the case at bar. Isolated cases may, perhaps, be found supporting the views advanced by defendant's counsel, but they are opposed by the authorities heretofore cited, and, indeed, by the great current of authority.

For these reasons, the judgment of the court of appeals should be reversed and the cause remanded to that court, with directions that a judgment be entered affirming that of the circuit court. All concur.

GALBREATH, Appellant, v. THE CITY OF MOBERLY.

- Pleading: PRACTICE. Where the replication simply denies the allegations in the answer of a final settlement, the evidence will be confined to the issues thus made.
- Instructions, Review of. It is unnecessary to review instructions when the result of the trial could not lawfully be otherwise than it is.
- 3. Officer: SALARY: PRESUMPTION: ESTOPPEL. An officer of a city government must be presumed to have knowledge of the ordinances or orders establishing and continuing his salary, and where the city has paid him the salary it regarded as due him, and he has received it as such, he is estopped from claiming more.

Appeal from Moberly Court of Common Pleas.—Hon. G. H. Burckhartt, Judge,

AFFIRMED.

Hollis & Wiley for appellant.

A municipal corporation cannot, by simple order of resolution, placed upon the minute book of the clerk, do what its charter expressly says must be done by ordinance. 1 Dillon Munic. Corp., p. 173, § 55; Ib., 362, § 246; Ib., 364, § 249; Saxton v. Beach, 50 Mo. 488; Kiley v. Oppenheimer, 55 Mo. 374; Leach v. Cargill, 60 Mo. 316. The defendant could fix the salary of plaintiff by ordinance only. The doctrine of estoppel cannot be applied to plaintiff when he acted in ignorance of his rights, and by the inducement and negligent or wrongful acts of defendant.

Wm. B. Sanford for respondent.

The plaintiff was bound to know what his salary as marshal was. Boucher v. City of Moberly, 74 Mo. 116. He was estopped from asserting this claim. "A settled account is prima facie correct, and will not be disturbed, except for fraud or mistake in the settlement." Kennedy v. Goodman, 15 N. W. Rep. 834; Kronenberger v. Bing, 56 Mo. 122.

Martin, C.—This was an action for \$578, claimed to be due to plaintiff on account of salary as marshal of the city of Moberly.

The plaintiff alleges in his petition that according to an ordinance of the city, approved July 5th, 1875, the salary of the city marshal was fixed at the sum of \$75 per month; the he was elected to the office in August, 1877, and was twice re-elected, in April, 1878, and in April, 1879; and that he held the office from August 1st, 1877, till April, 1880. He files an exhibit with his petition, showing that he was paid every month during the whole time of his service, at the rate of \$60 per month. This suit is for the difference between \$60 per month, which he received, and \$75 per month, as established in the ordinance.

The defendant, in its answer, admits the original valid-

ity of the ordinance and the election of plaintiff as marshal, and his services in that capacity during the time claimed. But it denies that the ordinance was in force while plaintiff was marshal. It alleges that before his election to the office the salary attached to it was reduced to \$60 per month by resolution of the city council. The answer then proceeds to plead monthly settlements with plaintiff at the rate of \$60 per month, and a final settlement with him at the expiration of his term of office for salary as marshal and for fines collected by him in that capacity. It is alleged that at this final settlement a balance was found due from plaintiff to defendant in the sum of \$63, which was subsequently paid by plaintiff, and that at no monthly, annual or final settlement did the plaintiff ever make claim to more than \$60 a month.

To this answer the plaintiff filed a replication of general denial.

At the trial of the case, a jury being waived, it appeared in evidence that the resolution reducing the salary before plaintiff became marshal, was passed by the city council. It was contended by plaintiff that this reduction and consequent repeal could be effected only by ordinance, and that the ordinance fixing the salary at \$75 a month continued in force during the whole term of his service. The balance of the answer relating to the monthly, annual and final settlements, was proved as alleged.

The plaintiff, in his testimony as a witness, admitted it substantially as alleged, and as sole excuse for attempting to go behind them in his suit, says that at the time of making them he supposed the council had passed a valid ordinance reducing the salary to \$60 a month, and did not know any better till after the settlements. The court found the issues in favor of defendant, and rendered judgment accordingly, from which the plaintiff has appealed.

The judgment will have to be affirmed for two reasons, either one of which is sufficient.

The defendant, in its answer, made plea of a complete

and final settlement of the plaintiff's claim for salary. The plaintiff, in his replication, simply denied the fact of such settlements. The issue thus established by the plea and replication, was the fact of a settlement or no settlement. No fraud or mistake, capable of avoiding the settlements, will be found in the replication, and consequently no such impleaded facts were admissible for the purpose of impeaching them. The evidence coming from both sides established the settlements, and a judgment for defendant was the only one the court could legally give in the case. It is, therefore, unnecessary to review instructions when the result of the case could not lawfully be otherwise than it is.

If the issues had been framed so as to admit of the plea of fraud or mistake tending to impeach the settlements, there was no evidence of either. As an officer of the city government, the plaintiff must be presumed to have knowledge of the ordinances or orders establishing and continuing his salary. If, in truth, he had no such information, he has no one to blame but himself. Certainly no misrepresentation or fraud was practiced on him by the city. She paid him during his term of service the salary which she regarded as due him in pursuance of the resolution or order of the council, and he received it as such, and this, under the circumstances disclosed in the evidence, should be the end of his claim for salary. The facts pleaded and proved constitute an estoppel.

Judgment affirmed. All concur.

SUMMERS V. COLEMAN et al., Plaintiffs in Error.

Equity: conveyance, when set aside: MISTAKE: FRAUD. Where the grantee in a deed represented she was seeking only a life estate in certain land, and presented to the grantor, her daughter, a deed to be executed therefor, and the latter made the deed under the belief that she was conveying a life estate, when in fact it conveyed an absolute estate in fee simple; *Held*, that whether the transaction was one of mutual mistake or of fraudulent misrepresention on the part of the grantee, equity will set aside the conveyance.

Appeal from Cooper Circuit Court.—Hon. E. L. Edwards, Judge.

AFFIRMED.

Smith & Krauthoff and Louis Wagner with L. F. Wood and Thomas B. Wright for appellants.

There are mainly two points presented in this case for adjudication in this court. 1st, Can a conveyance of a bare possibility or an expectancy be upheld and enforced in equity. 2nd, If such a contract can be upheld and enforced in equity, are there any circumstances of fraud surrounding this transaction of a character to vitiate the contract. In equity contracts relating to expectancies, have long been upheld. Fonblanque's Eq., 170, 171, note E; Fry on Specific Perform., 496, 500; Cook v. Field, 15 Q. B. 460; Wiseman v. Roper, 1 Rep. in Ch. 154; Beckley v. Newland, 2 P. Wms. 182; Lewis v. Madison, 1 Munf. 303; Stover v. Eycleshimer, 3 Keyes 620; s. c., 46 Barb. 84; Field v. Mayor, 2 Seld. 179; Carleton v. Leighton, 3 Merry. 671; Dodd v. Williams, 3 Mo. App. 278, 286. The consideration expressed in the deed, the love and affection respondent bore to her mother, is sufficient to uphold the deed. Wright v. Wright, 1 Ves. Sen. 411, 412; Bogy v. Shoab, 13 Mo. 365; R. S. 1879, § 3940. There are no circumstances of fraud connected with the execution of the deed of a character to vitiate it. Fraud will never be presumed, but must be

clearly established by the proof. Story on Contracts, § 625: Story Eq. Jur., § 490; 3 Greenleaf Ev., § 254. The law will not assist one capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. Story Eq. Jurisp., § 237; Blatchford v. Christian, 1 Knapp R. 77; Forrester v. Scoville, 51 Mo. 268; Johnson v. Quarles, 46 Mo. 423. The plaintiff read the deed and knew the meaning of the words she was reading, or must be presumed to have understood them, which is the same in law. Brooms Legal Maxims, 252, 262, note 5, 276. The plaintiff's mistake, if made, was one of law, and she cannot claim relief. Pomeroy's Eq., § 843; Toops v. Snyder, 70 Ind. 554; Zane v. Cawley, 21 N. Y. Eq. 130; Paine v. Jones, 75 N. Y. 593; Nelson v. Davis, 40 Ind. 366; Lanning v. Carpenter, 48 N. Y. 408; 18 Cent. Law Jour. 8, note 2; Ib., 9, note 6; 17 1b., 422. If the language of a deed is that intended to be used by the grantor, his mistake as to the legal effect of the language will afford no ground for relief in equity. Burt v. Wilson, 28 Cal. 632; McMurray v. St. Louis, etc., 33 Mo. 377 · Hendrix v. Wright, 50 Mo. 310.

Cosgrove & Johnston with Rice & Walker for defendants in error.

The evidence shows that the deed from plaintiff to her mother was procured through fraud, and will be set aside. All contracts and conveyances, whereby benefit are secured by children to their parents, are objects of jealousy, and if not entered into with scrupulous good faith and reasonable under the circumstances, they will be set aside. Baker v. Bradley, 35 Eng. L. and Eq. Rep. 449; 1 Story's Eq. Jurisp., p. 292. There is a presumption of fraud in law from the confidential relation of the parties. Garvin v. Williams, 50 Mo. 206; Street v. Goss, 62 Mo. 226; Cocking v. Pratt, 1 Ves. 400; Slacum v. Marshall, 2 Wash. C. C. R. 397. It devolves on defendants to show the utmost good faith, and that the

contract was a reasonable and provident one. Davis v. Duke, etc., 2 Swan. 436; Edwards v. Burt, 2 DeGex, Mac. & G. 55; Garvin v. Williams, 50 Mo. 206. The conveyance, by reason of its subject matter, was fraudulent in law. Boynton v. Hubbard, 7 Mass, 112; Chesterfield v. Jaussen, 1 Atkyns, top page 301. Fraudulent representations as to the legal effect and operation of a contract, are sufficient to avoid the same. 2 White & Tudor's Eq. Cases, pt. 1. 559, 567, and cases cited; Berry v. Whitney, 40 Mich. 65; Mitford's Eq., 149. Where the minds of the parties do not meet, and the conveyance does not xepress their intention, it should be set aside. Story's Eq. Jurisp., (9 Ed.) § 164; Lertensdorfer v. Delphy, 15 Mo. 160; Johnson v. Huston, 17 Mo. 58; Hook v. Craighead, 32 Mo. 405; Young v. Coleman, 43 Mo. 179; Cassiday v. Metcalf, 66 Mo. 519. Plaintiff's deed attempting to convey a mere possibility or hope of inheritance in the lifetime of her ancestor, is a nullity. Alvis v. Schlesing, 16 Reporter 780; Beard v. Griggs, 1 J. J. Marsh. (Ky.) 22; Nicoll v. Railroad Co., 12 N. Y. 121; Lamb v. Kamm, 1 Sawyer (U. S. C. C.) 238; Bayler v. Com., 40 Pa. St. 37; Dart v. Dart, 2 Conn. 250; Jones v. Roe, 3 D. & E. 42; Boynton v. Hubbard, 7 Mass. 112; Kercheval v. Triplett, 1 J. J. Marsh. (Ky.) 22; 1 P. Wms., 312, 313; 3 Ib., 293; 1 Wils. 323; 2 Vesey 144. The conversations had with Virginia Summers, and her declarations as to the purpose and effect of the deed prior to, at the time of and subsequent to its execution, were competent; were a part of the res gestae. Thomas v. Wheeler, 47 Mo. 363; Darrett v. Donnelly, 38 Mo. 492; Potter v. McDowell, 31 Mo. 62; Gamble v. Johnson, 9 Mo. 605.

EWING, C.—On the 13th day of December, 1877, the plaintiff filed in the Cooper county circuit court a petition stating her cause of action as follows:

That Lewis A. Summers died at Cooper county on the 4th day of May, 1877, intestate, seized of certain real estate situate in said county, and also of personal property valued

at \$10,000, leaving the plaintiff as his only heir at law and legal representative. Plaintiff was the daughter and only child of John Fenton Summers and Virginia Summers, and John Fenton Summers was the only son and child of Lewis A. Summers. John Fenton Summers died intestate, in the year 1857, leaving plaintiff and his widow Virginia Summers his only representatives and heirs at law. Virginia Summers died testate at Cooper county, December 1st, 1876.

In the year 1873, and prior and subsequent to that time, the plaintiff resided at Ottumwa, Iowa, and for some time before and a long time after that time, plaintiff's mother, Virginia Summers, resided there also with her daughter, the plaintiff. During that time, and while Lewis A. Summers was yet living, the said Virginia Summers being possessed of little or no estate, requested the plaintiff to convey to her an undivided half interest in the estate of her grandfather, said Lewis A. Summers, to which she would be entitled upon his death, for the period of the natural life of the said Virginia Summers only, and for her maintenance and support, and plaintiff consented to make such conveyance to her mother as a free and voluntary gift for the period of her natural life only. Afterward, about the 22nd day of November, 1873, said Virginia Summers went to the plaintiff at Ottumwa and took with her a deed already drawn up for plaintiff to sign, and represented to plaintiff that it was a deed from plaintiff to her of an undivided half interest in all the estate which plaintiff expected to inherit as the only heir of the said Lewis A. Summers, for the use and support of the said Virginia Summers during her natural life.

Plaintiff was reared by her mother, and had always lived with her until a short time prior to the date last mentioned, and entertained great love, respect and affection for her, and imposed in her implicit confidence, and so believing what her mother told her as to the nature and effect of the deed, viz.: That it was a deed to an undivided half interest in the estate of expectancy which was to descend

to her from her grandfather Lewis A. Summers at his death, for the natural life of her mother for her support, plaintiff executed and delivered the deed to her mother, on the 22nd day of November, 1873.

The deed purported to convey, in consideration of \$1, and love and affection, "the undivided half of all her interest in expectancy of whatsoever nature of, in and to all the real estate, personal property, moneys and effects which may hereafter descend to her by right of inheritance from Lewis A. Summers of Cooper county, Missouri, at the time of his death, whenever that may happen," etc.

Plaintiff then alleged that this deed was obtained by the fraudulent acts and representations of her mother, Virginia Summers, with the necessary averments, and asked the

deed to be held void, etc.

Upon proper pleading, on part of the defendants, to show that they claimed the property by virtue of the will of their Aunt Virginia Summers, the case was tried. The evidence is voluminous, much of it irrelevant; not a little incompetent, and which should have been excluded; much of it upon the question of the insanity of Lewis A. Summers, the grandfather of plaintiff. For the purposes of this decision, however, it will not be necessary to refer to any of the testimony upon the question of insanity. The substance of the evidence upon the question of the fraudulent representations on the part of plaintiff and defendant, is as follows:

The testimony, offered by the plaintiff, shows that plaintiff (the only child of John Fenton and Virginia Summers), was the only heir of Lewis A. Summers, who died in Cooper county, Missouri, intestate, May 4th, 1877, seized of real estate worth from \$10,000 to \$12,000, and some personal property. Virginia Summers died December 1st, 1876; the deed to her from plaintiff was recorded December 6th, 1876.

Mary Augusta Scott, testified: I am Mother Superior of the Convent of Visitation at Ottumwa, Iowa; I remem-

ber the execution of a deed from Mary E. Summers to Virginia Summers, in the parlor of the convent at Ottumwa. Iowa, sometime in the fall of 1873; I was present at the execution of the deed; Mrs. Virginia Summers brought the deed to the convent; the deed was executed a short time after she came; she brought it with her already drawn up; I had conversation with Virginia Summers on the morning of the day on which the deed was executed, and prior to its execution; Mrs. Summers said she had asked sister, Mary Rose (plaintiff) to give her one-half of her (plaintiff's) grandfather's estate, during her (Virginia Summers') life, and at the end of that time it would return to her (plaintiff); the same conversation was repeated several times that morning before the deed was executed; the propriety of the execution of this deed was discussed among the sisters at the convent.

In her cross-examination she testified as to the vows of obedience, poverty and chastity taken by each member and their effect and obligations. The plaintiff had taken these vows before she executed the deed; when Mrs. Virginia Summers came to us to reside, in 1875, she offered me the deed to destroy; she said she wished to reside with us; that all she wanted with the deed was to have a home in her old age; she desired the deed for the purpose of securing herself a home in her old age; but, if we would give her a home during her lifetime, and allow her to remain with her daughter, she would give me up her deed to be destroyed, as it would be of no use to her, as she could not transfer a life estate. A council was called, and the proposition to receive her, was accepted. After that was decided she came to me and offered me the deed, and told me to destroy it, and I told her to keep it till she returned; she started then to Missouri to collect some money from her brother, and get everything settled up and then return; but never returned.

Dr. J. W. H. Ross testified as to the insanity of Lewis

A. Summers, from spring of 1873, to time of his death, in 1877.

Mina Fegers says: I reside at Ottumwa, Iowa, and am a member of the Convent of the Visitation there. I have been a member fourteen or fifteen years; I resided in the convent in 1873; I was then Mother Superior; I know of the execution of a deed from the plaintiff to Virginia Summers at Ottumwa, in 1873; Virginia Summers was present at the time the deed was executed: I talked to Mrs. Summers with regard to this deed, before it was signed; Mrs. Summers said, in regard to the deed, that it was a deed to a half interest in the estate of Lewis A. Summers, for her life; this conversation was before the deed was signed; she said at her death it would come back to her daughter, plaintiff; she talked to me several times about the deed before it was executed; in these other conversations she stated, this property she got from her daughter, would be for her lifetime; I do not remember whether plaintiff was present at any of these conversations or not; I never heard any conversations between plaintiff and her mother about it. Before the execution of the deed, I saw a letter from Mrs. Summers to her daughter; it was not very long before, I think about a month, may be not that long; I read this letter; the rule of the convent is, that all letters, sent or received, are read by the Mother Superior; this letter was destroyed; I was acquainted with the handwriting of Mrs. Summers; this letter was in her handwriting and was signed by her; in that letter Mrs. Summers asked her daughter, plaintiff, for half of the estate of her grandfather to use, only, during her life; then, at her death, it would come back to her daughter, Mary E. Summers. Plaintiff answered that letter; I read her answer; she said she was willing to give the deed on the conditions asked; I next saw Mrs. Summers, in a very short time after this, at the convent; she remained only a very few days, three or four; this was in 1873, in the fall; she came to bring a deed; she brought one already written. It was the same

deed signed by plaintiff. I advised plaintiff, as an act of charity, to give or transfer to her mother one-half of the estate which would descend to her from her grandfather, for her life, without consulting any other member of the society; I thought that since it was the mother of one of our sisters, she might, as an act of charity, make the transfer; I did not read the deed; I advised plaintiff to sign the deed without knowing what the contents were.

Charlotte S. Grace says: I reside at Ottumwa, Iowa, and am a member of the Convent of Visitation in that city; I know of the execution of a deed by plaintiff, to her mother, Virginia Summers; I think the deed was made in the fall of 1873: I had several conversations with Mrs. Summers about the execution of the deed before it was made. Mrs. Summers said, in substance, at this first conversation, that she had asked her daughter, the plaintiff, to give her half of her property for her lifetime, and at her death it was to be returned to her daughter, Mary E. Summers: she told me this once or twice before the execution of the deed, and afterward, oh! I could not tell the number of times; by half of her property, I mean half of her grandfather's estate, just for her lifetime, and then it was to come back again; and she then offered mother the deed; I had conversations after the deed was made, at which the same thing was repeated; I had a great many talks, oftener than ten times, I think; once I heard a conversation between Mrs. Summers and the sisters, at which she was rehearsing to the sisters what occurred between plaintiff and her mother, at the time the deed was made; she was laughing at what her daughter said about not understanding the deed: the plaintiff said she had read the deed, and it said. "to her heirs and assigns," what does that mean? why don't it say return to Mary E. Summers; she said "pshaw! are you not my only heir? you are my only heir, and it is not necessary to put Mary E. Summers;" we all laughed because Mary could not understand the deed; this conversation was before the signature of the deed; her mother

insisted upon her reading the deed, and Mary said, "what is the use?" "what do I know about the law;" and Mary then read down to the words, "heirs and assigns," and stopped-found out it was all the same-and asked her mother what it meant, and then the above conversation occurred; I do not think she finished reading the deed, but cannot say certainly; there were several'sisters around at this conversation, but I do not know who; I was not present when the actual occurrence took place; only at the rehearsal of it; she wanted to come back and make her home with her daughter; when she left the last time, she had made application to stay in the convent, as a home; the proposition to receive Mrs. Summers and give her a home at the convent, was decided affirmatively; it was at this time when she was about to leave, and the carriage was at the door, that she offered mother the deed; mother said, when she offered the deed, that it was not necessary to leave it; she could bring it back with her.

Judge H. B. Hendershott, in his deposition, testifies, that he did not read or explain the deed to the plaintiff, nor did any one in his presence; he took her acknowledgment, but did not write the deed.

Rev. John Krekel, in his deposition, says: I knew of the execution of the deed, by plaintiff, to her mother, November 22nd, 1873; I had, prior to this date, conversations frequently with the grantee in said deed; in these conversations she always represented that her intention and purpose was to procure from plaintiff a life estate in the one-half of the estate of Mr. Summers, plaintiff s grandfather; from frequent conversations had between the plaintiff and her mother, with me, and in my presence, prior to and at the time of the execution of said deed, I am positive that Mrs. Summers, the grantee, only asked a life estate in said property, and that the plaintiff only intended to convey a life estate, and that Mrs. Summers represented that the property would revert to plaintiff at her mother's death;

there was no valuable or money consideration whatever, for the execution of said deed.

Mary C. Chase testified she and Mrs. Summers had frequent conversations in reference to the deed. In all these conversations, Mrs. Summers stated that the only purpose of said deed was to give her a life estate in the property conveyed, and that at her death the property would revert to

said plaintiff.

Eliza S. Coleman, in her deposition for defendant, says: In 1873, in the month of January or February, I saw a letter written by Mary E. Summers to her mother, Virginia Summers, from Ottumwa, Iowa, in relation to the insanity and estate of her grandfather, Lewis A. Summers, in which she requested her to go down to her grandfather's, have a guardian appointed for him, and see that the remainder of his estate was not wasted by the negroes, and she would then give her mother one-half of her grandfather's estate. Mrs. Summers handed me this letter to read, and I read it in my house in Otterville, and the foregoing is the substance of that letter. I do not now know where that letter is, but believe it was burnt by Virginia Summers in March, 1875, at which time she burnt up her letters. Virginia Summers afterward went to Boonville, and had a guardian appointed for Lewis A. Summers. In the latter part of April, 1873, I saw another letter from Mary E. Summers to her mother, Virginia Summers, in which she said: "I have had a talk with mother and the sisters, and they are willing that I should give you one-half of grandfather's estate, and you bring the deed when you come and I will sign it." This letter was in the handwriting of Mary E. Summers, and signed by her. This letter was, I suppose, destroyed at the same time she burned her letters.

Richard Coleman, for defendants, testified: I reside west of Otterville in Cooper county. Plaintiff is a neice of mine. Virginia Summers was my sister. Defendants are my neices and nephews. I am executor of Virginia Summers' estate named in the will. I visited Ottumwa,

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Iowa, between the 19th and 24th of January last. My neice had been writing to me she wished me to come up and see her. I wrote that I did not feel able, and she wrote me she would give me \$20 to defray my expenses if I would come I had not heard of the institution of this suit prior to starting to Ottumwa. I stopped at my brother, J. S. Coleman's, as I went up, and there heard from the defendants. who were there, that this suit had been begun. I had a conversation at Ottumwa in the parlor of the convent there. with the plaintiff, at the time of my visit. There was a board partition in the room made of square pieces, about an inch square, with spaces of two or three inches between. She was on one side of this and I on the other. In that conversation the matter of the execution of a deed from plaintiff to Virginia Summers, her mother, was brought up. She said she only gave it to her ma for her lifetime, and I asked her if she did not read it, and she said she did. She said when she came to the words "heirs and assigns," she asked her ma what it meant, and her ma said "you are my heir." I don't think there was any one present at this conversation, except ourselves.

The evidence in this case upon the question of the intention and understanding and purpose of the parties in making the deed sought to be set aside, is nearly all on one side. If the witnesses are creditable, and there is no effort made to show the contrary, then but one conclusion can be reached. Here are six witnesses; five of them inmates and officers of the convent in which the plaintiff is a sister, in which all property is held in common; and therefore supposed to be more or less interested in the final determination of the suit; the sixth, the attorney of the institution and a notary; all present, all understanding that the deed was conveying only a life estate, and permitting it to be executed and delivered. These witnesses must have believed what they testified to. It is reasonable to suppose that if they had been aware the plaintiff was making an absolute deed, they would have so informed her at the time, be-

fore she signed and acknowledged it. If she could have been prevailed upon, as her letters clearly show she might, would not the Mother Superior, the sisters, the priest, the lawyer, have then and there prevented the execution and delivery of this deed, rather than now, by wholesale perjury, undertake to set it aside? The evidence clearly shows misunderstanding and mistake and constructive fraud. One witness says the plaintiff read the deed and when she came to the clause "unto the said Virginia Summers, her heirs and assigns absolutely," she said, "why mother, what does this mean, I intended for this property to come back to me when you die?" And the mother answered: "You are foolish, my child, don't you know that you are my only child and heir? It is not necessary to put in the deed Mary E. Summers." This, I think, is entirely consistent with fairness and good faith. It was true that Mary E. Summers was her only child and daughter, and if the mother had died without making a will, the daughter would have inherited her mother's estate. Before we can reach the conclusion that Virginia Summers was at the time of the execution of this deed intending to deceive her only daughter; was then trying to mislead the Mother Superior, the sisters, the priest and lawyer, we must presume that she was wily enough to concoct and carry out a scheme by which she would obtain the absolute title to the property, keep back the deed from record and by will divert its direct descent from the daughter. True, she did make a will in favor of defendants, but not until November 14th, 1876. She died December 1st, 1876, and after her death the deed was recorded on December 5th, 1876. Is it not more reasonable as well as more charitable to conclude that this claim of absolute title arose long after the deed was procured; long after she had seen her daughter, and possibly when making her will on a bed of sickness? But however that may be, it is very conclusive to my mind that Mrs. Summers represented that she was only seeking a life estate, and equally clear that plaintiff believed she was only conThe State ex rel. Baublits v. The County Court of Nodaway County

veying the same interest. If this be true, and it was an honest mistake and misapprehension as to the facts on both sides; or if the transaction was reeking with fraud, and the deed was procured by the false and fraudulent representations of Mrs. Summers, the result must be the same; the deed must be set aside. Young v. Coleman, 43 Mo. 179; Cassidy v. Metcalf, 66 Mo. 519, and authorities there cited; Griffith v. Townley, 69 Mo. 13; Miller v. Simonds, 72 Mo. 669.

There was objection made on both sides to the introduction of evidence, which we have carefully examined, and while some of it should have been excluded for incompetency and irrelevancy, yet it could not even, if considered, have affected the result of the judgment.

In the view of the case taken by this court, and probably by the circuit court, the question of the sanity or the insanity of the ancestor of the plaintiff, Lewis Summers, was not material.

The judgment below is affirmed. All concurring.

THE STATE ex rel. BAUBLITS, Appellant, v. THE COUNTY COURT OF NODAWAY COUNTY et al.

Opening Road: APPEAL: CERTIORARI. When all the errors committed in the proceedings in the county court, in the matter of opening a road, could have been corrected on appeal to the circuit court, and the relator was not prevented from taking his appeal by any misfortune to him, or by any fraudulent or unfair practice of his adversaries, he will not be permitted to have said proceedings reviewed by a writ of certiorari.

Appeal from Nodaway Circuit Court.—Hon. H. S. Kelley, Judge.

AFFIRMED.

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S. R. Beech and W. C. Ellison for appellant.

A motion for a new trial was unnecessary in this case. O'Connor v. Koch, 56 Mo. 253; Bowie v. Kansas City, 51 Mo. 454; Funkhouser v. Mallen, 62 Mo. 555; Butler v. Lawson, 72 Mo. 227. Although the right to appeal is given by statute, yet a review by certiorari also lies. The statutory provision for an appeal (if not unconstitutional) is so imperfect and imcomplete, that it in no manner affects the remedy by the common law writ of certiorari, and, even if the statutory provision for an appeal is ample and full, it does not affect the right to the writ of certiorari when the errors complained of go more to the jurisdiction of the court than to the irregularity of the proceeding. Where the error complained of is a jurisdictional one, a certiorari lies, although ample remedy by appeal be given by statute. Milwaukee Iron Co. v. Schubel, 9 Am. 591; Owens v. State, 27 Wis. 456; Schuylerville, etc., v. Betts, 55 N. Y. 600; Flanders v. Haines, 3 Thomp. & C. (N. Y.) 224; Tierney v. Dodge, 9 Minn. 166.

Edwards & Ramsay for respondent.

The appellant should have appealed to the circuit court under Revised Statutes, section 6967.

Henry, J.—Relator had the record of the proceedings of the county court of Nodaway county, in the matter of opening a road in that county, returned to the circuit court on a writ of *certiorari*, and there filed his motion to quash the proceedings, which was overruled, and from the judgment he has prosecuted an appeal to this court.

The record of the county court is so voluminous, that I shall not incorporate it in this statement of the case. The alleged errors in the proceedings of that court, will sufficiently appear in what follows.

An appeal lies to the circuit court from the judgment of the county courts, assessing damages, or for opening, The State ex rel. Baublits v. The County Court of Nodaway County.

changing or vacating a road, and the circuit court, on such appeal being taken, is required to hear and determine the same anew. R. S. 1879, § 6967. It is contended by relator's counsel that the above provision for an appeal is so imperfect and incomplete, that it in no manner affects the remedy by the common law writ of certiorari, and that even if ample and full, it does not affect the remedy by certiorari, when the errors complained of go more to the jurisdiction than to the irregularities of the proceedings. There is no jurisdictional question in this case. The initial proceedings were all in exact conformity with the statute, and none of the alleged irregularities which occurred in the subsequent proceedings affected the jurisdiction of the court.

Section 6967 provides that: "No commissioners shall be appointed by the circuit court, nor shall any appeal prior to the determination thereof in the circuit court, operate as a supersedeas of the proceedings in the county court," and counsel for relator contend, that viewing the premises by the commissioners or jury, so that their own senses may be made to testify in behalf of the property holder, is so essential, when required by law, that their failure to comply with the law, in this respect, renders the whole proceeding void. If so, then no length of time, short of that from the lapse of which, without objection to its public use by the owner, its dedication by him may be found, would exempt the judgment of the county court from successful collateral attack for this irregularity in the condemnation.proceedings. We cannot give our assent to this proposition. viewing of the land by the commissioners, appointed by the county court to assess the damages to the property owners, is not a jurisdictional fact, but additional means provided to aid them in determining an issue in the proceeding. If they have disregarded this requirement of the law on appeal to the circuit court, while the owner of the land may be deprived of any advantages he may have derived from a personal inspection of the premises by the commissioners, yet the trial in the circuit court is de novo.

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and he may introduce all the testimony at his command to show the extent of his damages. The commissioners are not authorized to assess the damages on merely viewing the land, but are required to hear such competent evidence as may be offered on either side.

But it is urged that: "There can be no trial anew as to the public utility of the road." "The surveyor does not again mark out the road." This may be so, but is there any other tribunal more competent than the county court of a county to pass upon the question of the public utility of a proposed road within the county? And is there any thing in this record which would warrant the circuit court, or this court, in deciding that it was not a road of public utility?

With respect to the other matters, that the surveyor does not again mark the road, it is sufficient to say, that if he has located the road upon other lands than those through which it was proposed in the petition to run it, and the departure from that route is so flagrant as to justify it, this abuse of his authority, even though committed under the direction of the county court, may be corrected on a trial de novo in the circuit court. But the principal ground of complaint against section 6967 is, that it provides that the appeal shall not operate as a supersedeas, and that as a consequence the cause appealed may pend in the appellate courts for years, and, in the meantime the hedges, fences and orchard of the owner of the land may have been destroyed, and acres of his land have been thrown out to the public. While, if endowed with superhuman powers of endurance, the appellate courts might so dispatch business that causes appealed would not be pending in them for years, yet that would not enable this court to correct the legislation which permits the road to be opened before an appeal can be determined, and without the payment of any compensation to the owner of the land taken, except in fancied benefits.

In its wisdom, the legislature saw proper to enact that

the appeal should not operate as a supersedeas, and even if our wisdom should conclude that their wisdom was foolishness, yet enactments of the legislature have more force than our suggestions to the contrary.

All the errors committed in the proceedings in the county court, could have been corrected on appeal, in the circuit court. There is no pretense that relator was prevented from taking his appeal by a misfortune to him, or by any fraudulent or unfair practice of his adversaries, and the cases cited on this point have no relevancy here.

We are not inclined to encourge a resort to the remedy by *certiorari* in appealable cases. We will not say, now, under what circumstances this remedy will be allowed to correct the errors committed by inferior tribunals. It is sufficient to say, that no fact appears in the record before us to justify a resort to it.

The judgment of the circuit court is affirmed. All concur.

BURKE V. ADAMS, Appellant.

- Alien: DESCENT: STATUTE. Under Revised Statutes 1879, section 325, an alien may take real estate by descent from an alien.
- 2. Deed, Recording: WHEN A DELIVERY. A deed with a receipt of the purchase money expressed therein and executed, acknowledged and placed on record by the grantor, is evidence of the latter's intent to pass title to the grantee, and these acts constitute such evidence of a delivery of the deed as to impose the burden upon the grantor and his privies to show, by clear countervailing proof, that a delivery was not intended.
- Estoppel in pais: MINOR. An estoppel in pais cannot be asserted against a minor.
- 4. ——: WHAT NECESSARY TO. Nor can an estopped in pais be invoked where the party sought to be estopped was not apprized of his rights, nor unless the act of the party relied on as an estoppel, was done with the intent that the other party should act upon it, and the lat-

ter was induced thereby to change his relation to the subject matter thereof to his injury.

- 5. Statute of Limitations, when it Cannot be Invoked. The bar of the statute of limitations cannot be invoked where the occupancy relied on to support it, is neither adverse, nor accompanied by any act showing a claim of exclusive ownership.
- Conveyance: FRAUD: EXISTING CREDITORS. A conveyance cannot be claimed to be fraudulent as to existing creditors, except by such creditors.

Appeal from Cooper Circuit Court.—Hon. E. L. Edwards, Judge.

AFFIRMED.

E. J. Smith & W. S. Shirk for appellant.

While an alien may take by descent from a citizen under Revised Statutes, section 325, an alien cannot take by descent from an alien, and thus create a perpetuity in aliens who owe no allegiance here. 2 Blackstone Com., 249, 274; 2 Kent, 53; R. S., § 5564; Greema v. Greema, 14 Mo. 526; Farrer v. Dean, 24 Mo. 16; Wacker v. Wacker, 26 Mo. 426; State v. Killian, 51 Mo. 80; Sullivan v. Burnett, 105 U. S. 334. Whatever claim plaintiff has under the deed from Wm. H. Burke, he is estopped to set it up against appellant. Skinner v. Strouse, 4 Mo. 93; Newman v. Hook, 37 Mo. 207; Rice v. Bunce, 49 Mo. 231; Pilkington v. Inc. Co., 55 Mo. 172. The putting the deed on record by Wm. H. Burke, was not a delivery of it to his brother. Am. Law Reg. 268, 269. Even if the deed was to plaintiff's father, it was made in fraud of creditors of Wm. II. Burke, and was void. R. S., § 2497; Lillard v. Shannon, 60 Mo. 522; Howe v. Waysman, 12 Mo. 169; 4 Kent Com. 464; Henderson v. Dickey, 50 Mo. 161. The action is barred by the statute of limitations, as the deed under which plaintiff claims was made and recorded in 1869; the action having been begun in 1881, and during that time Wm. H. Burke was in possession holding adversely to the deed.

Rice & Walker for respondent.

Although neither the respondent nor his father had been naturalized, this does not prevent respondent from inheriting and recovering the land. R. S. 1879, §§ 325, 2168; Sullivan v. Burnett, 15 Otto 334; Rankin v. Patton, 65 Mo. There was no estoppel in this case against plaintiff: he only became of age July 7th, 1880, and besides, did not know of his rights in regard to the land. Newman v. Hook, 37 Mo. 214; Acton v. Dooley, 74 Mo. 63; Lefever v. Lefever, 30 N. Y. 27; 34 Pa. St. 334; 14 Cal. 368; 6 Hill 16. At the time of making the quit-claim deed by W. H. Burke to DeForrest, even if respondent had been present, which he denies, he was an infant under age, and, therefore, was not estopped. McBeth v. Trabue, 69 Mo. 642; Lowell v. Daniels, 2 Gray 161; Schnell v. Chicago, 38 Ill. 382; Miles v. Lingerman, 24 Ind. 385; Brown v. McCune, 5 Sanf. 224; Bigelow on Estop., p. 480. There was a sufficient delivery of the deed by W. H. Burke to respondent's father; its filing and recording was a sufficient delivery. Shaw v. Hayward, 7 Cush. 170; Burt v. Cassety, 12 Ala. 734; Major v. Hill, 13 Mo. 247; Pearce v. Dansforth, 13 Mo. 360; Blight v. Schenck, 10 Pa. St. 285. Besides, the evidence shows that respondent's father had paid a full and valuable consideration for the land, and moved and remained upon the place until his death. Regan v. Howe, 121 Mass. 424; Cannon v. Cannon, 26 N. J. Eq. 316; Devorse v. Snider, 60 Mo. 235. There was no fraud in the case on the part of respondent's father, and even if this was so, it would not affect respondent's title, as this suit was commenced more than ten years after the filing, for record, of the deed alleged to be fraudulent. Hughes v. Littrell, 75 Mo. 573; Rogers v. Brown, 61 Mo. 187. The bar of the statute of limitations does not apply against respondent; the evidence showing that immediately after the execution of the deed to him, plaintiff's father moved on the land, and remained there until his death, and there being nothing to show that Wm. II. Burke,

although also remaining, claimed adversely to the deed. Hamilton v. Boggess, 63 Mo. 233; Bradley v. West, 60 Mo. 33. Payment of taxes by Wm. H. Burke was not sufficient to invoke the bar of the statute, unless he claimed adversely. Bradstreet v. Kinsella, 76 Mo. 63; Chapman v. Templeton, 53 Mo. 463.

Philips, C.—This is an action of ejectment to recover about 114 acres of land in Cooper county. Suit was instituted in September, 1880. The answer pleaded that the land in question belonged to one W. H. Burke, who had a brother named Thomas Burke and a son named Thomas; that his brother was an alien, never having been naturalized, nor having filed any declaration of intention to become a citizen of this country. The plaintiff is the son of Thomas Burke, who was likewise an alien. In 1869 said W. H. Burke executed a deed for said land to Thomas Burke, but the answer alleges that the grantee was the son of the plaintiff and not his brother. That said W. II. Burke filed said deed with the recorder, and had the same recorded in said county. That he afterwards got it from the recorder, and ever kept the same in his possession. That said deed was wholly without consideration, and made to defraud the existing and any future creditors of said W. H. Burke, and especially one Emily Fowler, who claimed a dower interest in part of this land. That said Thomas Burke (the brother) died in 1874. On June 12, 1874, said W. H. Burke, after the death of said brother, appeared before a notary public in the city of Sedalia, and personating Thomas Burke, made and acknowledged a deed for said land to himself, which deed he had recorded in said Cooper county.

In 1876 said W. H. Burke effected a loan on said land with one DeForest, through a loan agent, for the sum of \$800, and executed to him a deed of trust thereon to secure the same. The money becoming due in February, 1880, the agent of said DeForest adjusted the matter with said

W. H. Burke, by taking from him a deed of quit-claim to the land in satisfaction of the debt. The answer then alleges that possession of the land was surrendered to said agent, who thereafter placed the defendant in possession as his tenant. It is then averred that the plaintiff was cognizant of and present at the time of the execution of this quit-claim deed, and assented to the arrangement, whereby it is claimed he is estopped. The answer also pleaded the statute of limitations. The reply was a general denial. The cause was submitted to the court sitting as a jury for trial.

The evidence in brief tended to show that plaintiff's father came to this country from Ireland, prior to 1868, and the plaintiff came with him. They thereafter resided continuously in Cooper county, and most of the time lived with said W. H. Burke. They seem to have occupied this farm together. Said Thomas Burke purchased, soon after coming to Missouri, forty acres of land situated in Pettis county, a short distance from the land in controversy, at the expressed consideration of \$600. On the 2d of November, 1869, W. H. Burke contracted and deeded to one Gerringer 120 acres of land in Pettis county, including the forty acres he had theretofore conveved to his brother Thomas. He claims that he included this forty by mistake. The consideration was \$2,100. The deed to Thomas's forty was made by Thomas to said Gerringer, but the purchase money therefor, amounting to about \$700, was paid by Gerringer to W. H. Burke. W. H. Burke stated in his testimony that he afterwards paid \$650 of this money to his brother. On the 5th day of the same month, W. H. Burke conveyed the land in controversy to Thomas Burke for the expressed consideration of \$1,800, the receipt of which was acknowledged in the deed. This deed was acknowledged and recorded in said Cooper county. W. H. Burke, who testified on behalf of defendant, stated that he had this deed recorded and afterward took it out of the recorder's office; that he never delivered it to his brother;

that it was without consideration, and he was induced to make it on account of a claim for dower of Mrs. Fowler to a part of it; that his purpose was to get better terms of settlement with her, and that there was also a claim of about \$66 against him. He stated to several witnesses after making the deed to Thomas, that he had sold the land to his brother for so much cash, and the balance was to be paid so soon as they heard from "the ould country." His son Thomas was only about one year old when the deed to Thomas Burke was made. Other evidence material to the questions to be decided will be noticed in its proper connection. The court found the issues for the plaintiff, and the defendant has brought the case here by appeal.

The first question, and the chief one discussed by appellant's counsel, is that relating to the alienage of the plaintiff and his ancestor. Touching this issue it might be sufficient, perhaps, to say that the answer having averred that the plaintiff and his father were unnaturalized and had never declared their intention to become citizens, the burden of this issue rested on defendant. And, if the decision in State v. Killian, 51 Mo. 80, be correct, the proof fell short of the averments. In the case referred to, which was an action to have an escheat declared against land, it was held that the petition was defective, because it did not allege that the alien had not declared his intention to become a citizen, etc. And this, for the reason that the forfeiture could not be declared against him if he filed such declaration, and it was necessary to show that the land was held by one who was not within the exception. Much more so would this rule apply where the defendant, in order to defeat the prima facie right of the plaintiff, as heir, affirmatively alleges the want of such declared intention of citizenship. There was proof, perhaps, extracted from plaintiff, on cross-examination, from which the court might find the plaintiff and his father were born abroad, but there was scarcely anything to warrant a finding that neither had filed declaration of intention. But waiving this mat-

ter of pleading, we are satisfied that this branch of the defense is not sustained. The rigors of the common law in this respect, were early modified in the legislation of this State, until by successive enactments, the disabilities consequent upon alienage, to acquire and hold real property by purchase, devise and descent, have been nearly swept away. By the first enactment, (vol. 1, p. 697, Ter. Laws 1820.) the disability of the alien, in this respect, was removed as to foreigners residing in any of the United States or territories, who had made declaration of intention of citizenship. This continued in substance until 1835, (R. S. 1835, p. 66.) when not only aliens residing in the United States who had made such declaration of intention, but aliens resident in this State were made capable of acquiring real estate by purchase or descent, and of alienating the same. This provision was carried forward into the statutes of 1845, page 113, with the additional right of "holding" real estate. This was re-enacted in the statute of 1855, page 187, with the additional privilege to a non-resident alien to convey the land of his ancestor or devisor, provided it was conveyed within three years after the final settlement, etc. This act, with some unimportant additions was re-enacted in the revision of 1865, p. 448. And in 1872 the legislature practically swept away every impediment by enacting that: "Aliens shall be capable of acquiring by purchase, devise or descent real estate in this State and of holding, devising or alienating the same and shall incur the like duties and liabilities in relation thereto, as if they were citizens of the United States and residents of this State." It is not easy to comprehend the refinement of the argument that would disinherit this plaintiff in view of these statutes. Both ancestor and heir were residents of this State when the father acquired by purchase the real estate in question. Both lived here continuously until the father's death in 1874 and the heir has lived here ever since. The fact that the ancestor was an alien can make no difference as he resided in the State when he acquired the property and when

he died. After the legislature removed the disability in the case of a resident alien and then advanced to the declaration of qualifying the alien whether resident or not, to purchase, devise, take by descent and to hold, it would be violative of both the letter and the spirit of the law to say that the alien may buy, hold and devise and yet his heirs, especially a resident heir, cannot take by descent. The conclusion reached is supported by many adjudications under similar statutes, but our statutes are too plain to need any aid of judicial construction.

II. We do not deem it scarcely a matter in controversy that Thomas Burke, plaintiff's father, was the intended grantee in the deed made by W. H. Burke. The proof and circumstances are all one way, except the testimony of W. H. Burke. Of this witness it is just to say, from his conduct and contradictory statements, as disclosed by the record before us, he is wholly unworthy of belief; and the trial judge would have been justified in disregarding altogether his testimony, unless where corroborated by other testimony or circumstances. His testimony is full of palpable inconsistencies and reckless contradictions. Superadded to which he unblushingly took the witness stand and confessed to a forgery of the deed of June 12th, 1884, and to obtaining thereby, under false pretenses, \$800.

III. It is chiefly on the testimony of this witness that the point is made by appellant's counsel, that there was no delivery of the deed made by W. H. Burke to Thomas Burke. What constitutes a delivery of a deed is often a mixed question of law and fact. An arbitrary rule ought not to be laid down. Each case must stand more or less on its peculiar facts. The intent to convey is evidenced by the act of making out and duly executing and acknowledging a deed. The delivery may be evidenced by any act of the grantor by which the control, or dominion, or use of the deed is made available to the grantee. It is not necessary it should be handed over actually to the grantee, or to any other person for him. It may be delivered under cer-

tain circumstances, though it remain in the possession of the maker. Where, however, there is not an actual transfer from the grantor to the grantee, it should affirmatively appear from the circumstances, acts or words of the parties,

that the intention to pass the title really existed.

In Jackson v. Phipps, 12 John. R. 421, Judge Spencer said: "This delivery must be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing; or it may be both; but by one or both of these it must be made; for otherwise, though it be never so well sealed and written, yet is the deed of no force."

In Burt v. Cassety, 12 Ala. 734, it was held that where A had a deed drawn, and either by his attorney, or in person, carried it to the recorder to be recorded, that was a sufficient delivery, although the deed was not in fact recorded. The court say: "In our judgment these facts clearly establish a delivery of the deed. It is of no importance whatever that the vendee was not present when the deed was made. She is presumed to assent to it as the deed was for her benefit." The Supreme Court of Pennsylvania very properly, as I conceive, hold that while the recording of the deed is not absolutely conclusive of the fact of delivery it is evidence thereof and an assurance by the grantor of title in the grantee. Blight v. Schenck, 10 Penn. St., 289. The countervailing proof therefore that the recording was not designed as a delivery should be clear and persuasive in the instance where the grant was against the interest of the grantor, as where the receipt of the purchase money is acknowledged in the deed. In an early decision our Supreme Court held that the recording of a deed did away with the old common-law livery of scizin. Perry v. Price, 1 Mo. 555.

In Ayres v. Hayes, 13 Mo. 252, it was held that a deed of trust recorded by the maker without the knowledge of the beneficiary was a substantial delivery. Its acceptance by the cestui que trust might be presumed because the grant

was for his benefit; and in Pearce v. Dansforth, 13 Mo. 360 it was again held that "the delivery of a deed by the grantor for the purpose of having it recorded may under proper concurring circumstances be regarded as a delivery to the grantee." I think both on authority and reason that where the deed is duly executed, acknowledged and put to record by the grantor it is persuasive evidence as against him, especially where the purchase money is receipted for, that he intended thereby to pass the title; and the act would constitute delivery so as to throw the burden on the grantor and his privies to show by clear countervailing evidence that it was not a delivery. In this case the "proper concurring circumstances" are strongly against the pretension that the deed was not delivered. The deed had remained of record for over five years, at the time of the grantee's death, unassailed. The grantor in the meantime stating to his neighbors that he had conveyed the land to his brother and received part of the purchase money and expected the balance in a short time. Within eight days after his brother died he committed an act of forgery in an effort to get the title out of him and his heirs. The fact that he had the deed in his possession after his brother's death is not important, in view of all the facts in this case. His brother was an illiterate man, they lived together and his brother died in the house where W. H. Burke lived, leaving a widow and this plaintiff, a mere boy, helpless and at the caprice of this wily uncle. We think the evidence of delivery was fairly submitted and this issue was found for the right party.

IV. The estoppel set up in this case rests on the following state of facts: In February, 1880, when the agent of DeForest went to Burke to procure the quit-claim deed the plaintiff was there as a member W. H. Burke's family. He, perhaps, heard talk about making a deed and knew that a deed or something of the kind was drawn up; and he afterwards aided his uncle in moving from the premises and knew that the defendant came into possession. He

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said nothing, did nothing, only remained silent. The only evidence of a tangible nature as to the plaintiff's age was his own statement. He was then, according to his evidence, under twenty-one years old. If so this is a complete answer to the estoppel. McBeth v. Trabue, 69 Mo. 657; Bigelow on Estoppel, 490. It is also necessary to an estoppel in pais that the party should at the time be apprised of his rights. "Silence without knowledge works no estoppel." 31 Pa. Stat. 334. "There is no such thing as estoppel in pais for neglecting to speak or act when the party did not know the facts which if known would have made it his duty to speak or act." 6 Hill 16; 14 Cal. 368. The evidence as well as the surrounding circumstances tended to show pretty conclusively that the plaintiff at the time in question was quite ignorant of his rights. 59 Mo. 344. But what is more conclusive against this defense is another element in estoppel in pais; the act must have been done with the intention that the other should act upon it and the other party must have been induced thereby to act, to change his relation to the subject matter and to his injury, were the party allowed to assert the contrary. Big. on Estop. 480. There is nothing in this record to show an intention on the part of this plaintiff that DeForest's agent should act upon his conduct. He was only silent, an ignorant boy under the influence and control of his uncle, vaguely, if at all, comprehending what was in fact transpiring. But how can it be said that DeForest's agent by reason of any act of this plaintiff acted in this matter or changed his attitude toward the property? The agent was dealing with the uncle, scarcely aware of the presence of this boy. What has DeForest lost by his silence? In what respect did he change his attitude? His money had long prior thereto been put into his uncle's hands. As DeForest could have gotten nothing more than the right, title and estate of W. H. Burke in this land by foreclosing his trust deed, and got that under the quit-claim deed,

what has he suffered by reason of the plaintiff's silence? If he was induced by plaintiff's non-action to take the quitclaim deed in satisfaction of the debt he did not thereby lose his right of action against W. H. Burke for the debt because the fraud would have been no bar.

V. The defense of the statute of limitations interposed is without support. The evidence shows that the two brothers and their families either lived together in the same house or separately on this land. There was nothing in the occupancy of W. H. Burke inconsistent with the title of record of Thomas Burke. His occupancy was neither adverse nor exclusive, nor was there any act of his during his brother's lifetime to show that he made claim of exclusive ownership. There was in fact no evidence to justify an instruction on this branch of the case at defendant's instance.

VI. It is finally claimed by appellant that this was a voluntary conveyance and a fraud upon existing and future creditors of W. H. Burke. It would be a sufficient answer to the first branch of this suggestion to say that no one of the alleged existing creditors at the time of the conveyance are complaining. The dower interest of Mrs. Fowler was not an existing debt of W. H. Burke, it was an existing incumbrance on the land which no act or deed of the owner of the fee could defeat or affect. Williams v. Courtney, 77 Mo. 588; Walker v. Larkin, 79 Mo. 664.

There is nothing in this record demanding any discussion of circumstances under which a conveyance would be a fraud as to future creditors. The debt to DeForest was created seven years after this alleged fraudulent deed was put to record. And there is not one word of credible evidence in the record on which any court would have been justified in voiding the deed on that ground.

The appellant has pressed upon our attention other minor points; they have not been over looked, but in our judgment are of such a character as in no manner to affect The State v. Smith.

the merits of the case. On the whole record the judgment was unquestionably for the right party and the judgment of the circuit court is therefore affirmed. All concur.

THE STATE V. SMITH, Appellant.

- Assault with Intent to Rape: INDICTMENT. An indictment for an assault with intent to commit a rape, need not set forth the manner or means of the assault charged. The general averment that the assault was made with the intent to ravish, is all that is requisite, and the details as to the mode and means of the act, are matters of evidence.
- Assault: Attempt: Intent. An assault with intent may exist without an actual attempt. There need not be a direct attempt at violence, but indirect preparations toward it will, in certain circumstances, constitute an assault, and the intent to use force may be inferred from the circumstances.
- Instructions. Where there is a conviction for a higher offense, a
 defendant cannot complain of an instruction authorizing a conviction for a lower. And it is not error to refuse instructions when
 those given fairly present the case to the jury,
- 4. ——: READING TO THE JURY. Revised Statutes, section 1908, does not require that the instructions should be read to the jury in the first instance, by the judge himself.
- 5. Indictment: VARIANCE. Where the indictment charges the assault was made on Olive Hodson, and the evidence shows that it was Mrs. Hodson, Held, no variance material to the merits of the case, since the court below did not so find, and that finding is the test on this point.
- 6. Discretion of Court: witness. Where a witness was not sub-pensed, and no diligence used to procure his attendance, it is within the discretion of the trial court to refuse to allow him to testify after the case is closed, but before it is submitted to the jury.

Appeal from Jasper Circuit Court.—Hon. James R. Shields, Special Judge,

AFFIRMED.

W. P. Campbell for appellant.

The verdict is against the evidence. To maintain the indictment, the prosecutrix must prove an attempt at penetration, or prove a struggle with the prisoner, showing from his acts or expressions that his intent was to have connection with her. 1 Arch. Crim. Pr., 1012. The verdict was contrary to the law, as declared by the court. The instructions should have been read to the jury by the court. R. S., § 1908. An indictment charging an assault with intent to commit a rape, must specify the manner and means of the assault, and the character of the force used. The motion in arrest of judgment should, therefore, have been sustained.

D. H. McIntyre, Attorney General, for the State.

The indictment is not defective in failing to specify the manner and means of the assault, and the character of the force used in making the same. State v. Meinhart, 73 Mo. 562. And the verdict is not against the evidence. 2 Bish. Crim. Law, (6 Ed.) § 1122, p. 620; Reg. v. Mayers, 12 Cox C. C. 311; Carter v. State, 35 Ga. 263; Sharp v. State, 48 Ga. 16. The point that the Mrs. Hodson, who testified upon the trial, was not proven to be the Olive Hodson named in the indictment, is not well taken; it constituted no variance. R. S., § 1820; State v. Barker, 64 Mo. 282. The statute does not mean that the court, itself, must read the instructions. The attorneys may do so. R. S., § 1908. The remarks of the prosecuting attorney cannot properly be assigned as error. State v. Emory, 79 Mo. 461.

T.

Sherwood, J.—The defendant was convicted of an assault with intent to commit a rape. The indictment is well enough. It was not needful that it set forth the manner, means or mode of the assault charged. The general aver-

ment that an assault was made with the intent, etc., was all that was requisite; details as to the mode, are immaterial and unnecessary, not necessary to be incorporated in the indictment, as the circumstances evincive of the design with which the act was done, are regarded as matters of evidence to demonstrate the intent to the jury. Wharton Crim. Plead. and Prac., § 159; 1 Wharton Crim. Law, § 644; Wharton Prec. of Indict., 253, et seq; State v. Chandler, 24 Mo. 371; 3 Chitty Crim. Law, 828.

II.

It is claimed that there is no evidence to justify the verdict. I entertain a different opinion. An assault is defined to be: "An inchoate violence to the person of another with the present means of carrying the intent into effect." 2 Greenleaf Ev., § 82. An assault with intent, may exist without the actual attempt. Regina v. Dungey. 4 F. & F. 102, and note. There need not be a direct attempt at violence, but indirect preparations toward it, will, in certain circumstances, constitute an assault. 1 Selw. N. P., 27; Bull. N. P., 15; 3 Chitty Crim. Law, 821. Thus it has been held that where the prisoner decoved a female under ten years of age into a building, and was detected within a few feet of her in a state of indecent exposure, although he had not touched her, that he was properly convicted of assault with intent to commit a rape. Hays v. People, 1 Hill 351. The intent to use force may be inferred from the Thus in one case the prosecutrix awoke; circumstances. she found the defendant in bed with her, holding her by the wrist, and he escaped when she called on the family for help; it was held there was evidence sufficient to convict him of an assault with intent to ravish. Carter v. State, 35 Ga. 263; I Whar. Cr. Law, § 576 a.

In the case at bar the defendant was discovered about two o'clock in the morning in the bed where Mrs. Hodson, her husband and a little child were sleeping. The blanket had been moved from her person and she lay on her back,

and stooping over her, and with his face within a foot of hers, the defendant is discovered with nothing on but his shirt, on his knees with his hands resting on each side of the prosecutrix. What was he there for? Certainly not to say his pater noster. It may be that he thought he could gratify his cumulative concupiscence by successfully personating the woman's husband. Or, it may be he was so inflamed with fleshly lust as rashly to imagine that, despite the unpropitious surroundings, he could storm the citadel of virtue before successful resistance could snatch his prey from him. It is wholly immaterial whether he entertained the idea of fraud or force; there was sufficient evidence for the jury to have found either way, and by their verdict they have negatived the idea of fraud and affirmed that of force, and this ends that matter. As bearing on the question of intent in similar circumstances and situations: State v. Eddings, 71 Mo. 545; State v. Carpenter, I Houston Cr. Rep. (Del.) 367; State v. Neely, 74 N. C. 425.

III.

So far as concerns the instructions as to insanity, and as to reasonable doubt, they are in accord with those heretofore approved by this court. And as to the second instruction, given at the instance of the prosecuting attorney which would have sanctioned a verdict of the jury for a common assault, it is scarcely necessary to say, that as the jury have found the defendant guilty of a higher offense, such an instruction could have worked him no hurt. And since the instructions given were sufficiently fair the refusal of others constitutes no error. As to the point that the instructions should have been read in the first instance to the jury by the court, to-wit by the judge himself, it suffices to say that section 1908 does not require that this be done any more than it requires that the instructions be actually written by the court, merely because that section prescribes that "the court must instruct the jury in writing." Even

if it be assumed that the section being considered is mandatory, as counsel claim, from no part of it can it be gathered, or so much as reasonably inferred that the court was either expected to write the instructions for the jury, or to read them to the jury after they have been written.

IV.

Nor is there anything in the point that the indictment charges that the assault was made on Olive Hodson and the evidence shows that it was Mrs. Hodson. The court before which the trial was had did not find that the variance was material to the merits of the case, or prejudicial to the defense of the defendant, or else, doubtless, it would have directed an acquittal. The statute governs this. R. S., 1879, § 1820; State v. Wammack, 70 Mo. 410; State v. Sharpe, 71 Mo. 218.

V.

It was within the discretionary powers of the court to to refuse to admit Dr. Mathews to testify on behalf of the defendant, after the case was closed, but before it was submitted to the jury. The Dr. had not been subpænaed, nor had any diligence to secure his attendance been shown. Roach v. Colbern, 76 Mo. 653.

VI.

The case of State v. Emory, 79 Mo. 461, is an answer to the objections taken to the closing remarks of the prosecuting attorney. The judgment for these reasons should be affirmed. All concur.

Thompson v. The Chicago, Rock Island & Pacific Railway Company.

THOMPSON V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

- Pleading: PRACTICE: PARTIES. Where all of several tenants in common do not join in an action of quare clausum fregit, the defendant cannot take advantage of it after having gone to trial, but must plead it in abatement.
- 2. ——: ——: Under our practice, when a defect of parties appears on the face of the petition, it must be taken advantage of by demurrer, and if it does not so appear, by answer; and if not thus taken advantage of, the objection is deemed to be waived.

Appeal from Platte Circuit Court.—Hon. Geo. W. Dunn, Judge.

AFFIRMED.

M. A. Low for appellant.

The motion for a new trial should have been sustained. The objection to the non-joinder of Field was taken at the proper time and in the proper manner. Little v. Harrington, 71 Mo. 390; Seip v. Tilghman, 23 Kas. 289.

Anderson & Carmack for respondent.

Norton, J.—This was an action commenced before a justice of the peace, to recover damages for injury done to a crop of ungathered corn. The plaintiff recovered judgment before the justice, and the defendant appealed to the circuit court, where, on trial anew, the plaintiff introduced testimony tending to prove that during the crop season of 1878 he cultivated in corn a part of George W. Field's farm; that Field was to have one-half of the corn, when gathered, as rent; that during the months of September and October of that year, while the corn was standing in the field, ungathered and undivided, hogs entered the field through a defective fence along defendant's road, and damaged the corn to the extent of \$30, of one-half of which plaintiff was the owner. Field was not a party to the suit.

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Defendant asked the court to declare the law as follows:

1. Inasmuch as plaintiff's proof shows that the corn, injured and destroyed, was not harvested at the time of the injury, but was standing and growing on the lands of G. W. Field, and was the joint property of plaintiff and said Field, and undivided, the plaintiff cannot recover in this action, and the finding ought to be for defendant.

2. Under the pleadings and the evidence in this cause, the finding and judgment ought to be for defendant.

These instructions the court refused, and, thereupon, rendered judgment for the plaintiff, from which defendant has appealed.

Conceding (without so deciding) as counsel for defendant contends, that the corn destroyed was the joint property of Field and plaintiff, and that Field should have been made a co-plaintiff, the fact that he was not, cannot be taken advantage of after the parties have gone to trial on the merits, so as to force a nonsuit. It was held in the case of Rich v. Penfield, 1 Wend. 380, approvingly cited by this court in the case of Van Hoozier v. Railroad Co., 70 Mo. 145, that when there are several tenants in common, and all do not join in an action of quare clausum fregit, the defendant cannot take advantage of it at the trial, but must plead it in abatement, and this is the general rule in actions for torts. The only advantage which can be taken of the non-joinder upon the trial, is by way of apportionment of the damages. It is not ground for a nonsuit.

Under our practice, when the defect of parties appears on the face of the petition, it must be taken advantage of by demurrer, and if it does not so appear, by answer; and if not thus taken advantage of, the objection is deemed to be waived. This case seems to have been twice tried on its merits, once before the justice and once in the circuit court and, so far as the record shows, no motion was made, based on the ground that there was a defect of parties, and no advantage was sought to be taken of the non-joinder till

after the cause was tried on its merits, and the advantage then asked was, that the plaintiff should be nonsuited.

Judgment affirmed. All concur.

THE CITY OF KANSAS V. HILL et al., Appellants.

- 1. Condemnation of Property for Street Purposes: CHARTER: JURY. A jury of six men, freeholders of the City of Kansas, as provided for in the charter of said city, is a competent jury to try an appeal from the mayor to the circuit court, in a proceeding under the charter to condemn private property for the purposes of street extension.
- 2. Condemnation Proceedings: EVIDENCE. On the trial of said appeal, the defendant offered evidence to show that the fact that the real estate sought to be condemned was located, and had been located for many years, in the line of the street proposed to be extended, and between the east and west parts of said street already opened, diminished its value, which evidence the court excluded; Held, error.
- 3. ——: Instructions. The city charter provided, in reference to proceedings to condemn property for street purposes, that "parties interested may submit proof to the jury, and the latter shall examine, personally, the property to be taken and assessed;" Held, that an instruction was erroneous which told the jury that in assessing the value of the property, they might wholly disregard the evidence offered, and make their finding from their own observation alone.
- Appeal: AGREED CASE. The appeals in this proceeding Held, to be properly in the Supreme Court, under rule 20 thereof, relating to agreed cases.

Appeal from Jackson Circuit Court.—Hon. S. H. Woodson, Judge.

REVERSED.

Tichenor & Warner and O. H. Dean for appellants.

The appellants were entitled to a jury of twelve men. Cons., art. 2, § 21; Vaughn v. Scade, 30 Mo. 600; Henning v. Railroad Co., 35 Mo. 408; State v. Van Matre, 49 Mo. 268; Kine v. Defenbough, 64 Ill. 292; Isom v. Railroad Co.,

36 Miss. 312; Armstrong v. Jackson, 1 Blackf. 374. Appellants were entitled to a jury composed of six disinterested freeholders of the city; the jury that tried the cause was liable to pay a part of whatever might be assessed against the city, and hence was not impartial. Woodford v. Railroad Co., 2 Swan 436; M. A. L. Ry Co. v. Barnes, 40 Mich. 285; Dively v. City, 21 Iowa 565; Eberly v. Board, etc., 11 Mo. 247; Fine v. St. Louis, 30 Mo. 166; Fulwiler v. City, 61 Mo. 479; Rose v. City, 49 Mo. 509. The instruction number five, that the jury were not bound to find according to the evidence, and might make their finding from their observation alone, was erroneous. Redf. on R. R., p. 288; C. P. R. R. Co. v. Pearson, 35 Cal. 261; Chandler v. Jamaica, 122 Mass. 305; N. O. R. R. Co. v. Zeringue, 23 La. An. 522; Co. Ct. v. Griswold, 58 Mo. 199; Hannibal v. Schaubacher, 57 Mo. 588; W. K. C., etc., v. Waldro, 70 Mo. 630; Hosher v. Railroad Co., 60 Mo. 303; K. C., etc., v. Campbell, 62 Mo. The court erred in refusing to admit the evidence to show that the property sought to be taken was diminished by the fact of its situation on Eighth street between east Redf. on Railand west parts thereof already opened. ways, (5 Ed.) p. 290, note 22; City v. Bolton, 9 Heisk. 508; S. & E. R. R. Co. v. Doughty, 2 Zab. 595; Soulard v. City, 36 Mo. 544; Hosher v. K. C., etc., R. R. Co., 60 Mo. 303. Unlimited speculation is not allowed in arriving at the damages caused by condemnation proceedings. C. & P. R. R. Co. v. Francis, 70 Ill. 238, Hoenstein v. Railroad Co., 51 Pa. 87; Rogers v. Railroad Co., 35 Me 319. The record of the case was properly made up under rule 20 of this court.

J. Brumback for self and for the city.

Appellants were not entitled to a common law jury of twelve men. L. & F. P. Co. v. Pickett, 25 Mo. 535; Mills on Eminent Domain, §§ 91, 253, 254; People v. Justices, etc., 74 N. Y. 406; People v. Clark, 23 Hun 374; Cruger v. Railroad Co., 12 N. Y. 190; Pusey's Appeal, 83 Pa. St. 67;

Mitchell v. Railroad Co., 68 Ill. 288; State v. St. Louis, 52 Mo. 576; Mayor v. Long, 31 Mo. 369; Comm. v. Ryan, 5 Mass. 89; Comm. v. Worcester, 3 Pick. 461; Comm. v. Reel, 1 Gray 472; Uhrig v. St. Louis, 44 Mo. 458. Instruction number five was proper. C. B. & Q. R. R. Co. v. Railroad Co., 58 Ill. 273. The case is properly here under rule 20 of the Supreme Court.

Boggess, Cravens & Moore for Reid.

The objection by appellants to the number and qualifications of the jurors, was untenable. Kansas City Charter, § 6, (Acts of Legislature 1875, pp. 244, 249); Cons., art. 2, § 21; L. & F. R. R. Co. v. Pickett, 25 Mo. 535. There was no error in the exclusion of the evidence complained of. Its object was to diminish the value of land sought to be condemned, by reason of the fact that it was situated between the east and west ends of said Eighth street, where it might be taken when that street should be extended. There was no legal necessity to extend said street, hence it might never be done, and to admit such evidence was to prejudice the jury against the rights and interests of the land owners. Instruction number five, complained of by appellants, was properly given. 19 Wend. 695; Piper's Appeal, 32 Cal. 530; Pryor's Appeal, 19 Wend. 651, 659; Tidewater Canal Co. v. Archer, 9 Gill & J. 479; Caster v. Trust Co., 4 Zab. 730; Remy v. Municipality, 12 La. An. 500; Columbia, etc., v. Geisse, 36 N. J. 537. The court will not undertake to review the verdict of the jury, unless it is clear they proceeded on a wrong theory in arriving at their conclusion. St. Louis, etc., R. R. Co. v. Richardson, 45 Mo. 466; Miss. Co. v. Ring, 58 Mo. 491; Lee v. Railroad Co., 53 Mo. 178; Quincy v. Ridge, 57 Mo. 599.

RAY, J.—This is a proceeding begun by the City of Kansas, before the mayor of said city, under and in pursuance to its charter, (sections 1 to 6, inclusive, Acts of

1875, pp. 244, 249,) to condemn and appropriate certain real estate therein mentioned, to the use of the city for street purposes, and to extend Eighth street in said city from the west line of Delaware street to the east line of Wyandotte street, a distance of several hundred feet, and thereby connect the east and west ends of said street already opened, and thus render the same continuous, and to make just compensation therefor. The city ordinance passed for that purpose is as follows:

No. 19,350.

An ordinance to amend an ordinance to open and extend Eighth street from Delaware street to Wyandotte street.

Be it ordained by the Common Council of the City of Kansas:

Section 1. That an ordinance No. 19,143, entitled "An ordinance to open an extend Eighth street from Delaware street to Wyandotte street," approved April 1st, 1880; be and the same is hereby amended so as to read as follows, to-wit: Beginning at the intersection of the south line or T. H. Swope's second addition to Kansas City with the west line of Delaware street, thence west along the south line of said T. H. Swope's second addition to the east line of Wyandotte street, thence south sixty (60) feet; thence east and parallel with the south line of said Swope's second addition to the west line of Delaware street; thence northwardly sixty and six-tenths (60 6-10) feet to beginning, and all private property within said boundaries is hereby condemned for public use as a street, and just compensation therefor shall be assessed, collected and paid according to law.

Section 2. The common council hereby determines and prescribes the limits within which private property shall be deemed benefited by reason of the proposed improvement mentioned in the preceding section, and be assessed and charged to pay just compensation therefor as follows, to-wit: Beginning at a point on the west

line of Walnut street one hundred and twenty-three (123) feet north of the north line of Eighth street; thence west to a point on the east line of Broadway street one hundred and nineteen (119) feet north of the north line of Eighth street; thence south three hundred and twenty-nine (329) feet; thence east to a point on the west line of Walnut street one hundred and forty-six (146) feet south of the south line of Eighth street; thence north three hundred and twenty-nine (329) feet to the beginning.

Section 3. That the sum of \$100 be, and the same is hereby appropriated out of the general fund to pay the costs and expenses of the proceedings necessary to condemn the private property so to be taken, and a part of such sum as may be assessed against the city of Kansas as benefits to the city and public generally by reason of opening and extending said street.

Approved May 4th, 1880.

C. A. CHACE, Mayor.

Attest, V. D. CALLAHAN, City Clerk. (Seal).

A map accompanying the proceedings, sets forth and exhibits the land to be taken, and the limits within which, "benefits" are to be assessed, to raise the money to pay for the same.

It seems there were eight or nine separate parcels of land sought to be taken and condemned, owned by about as many several parties; and about ninety or more separate and distinct parcels of land subject to be assessed with "benefits," to raise the money to pay for the land so taken, and some hundreds of persons interested in the lands subject to be assessed with benefits, all of whom, are made parties defendants in the proceeding.

Such proceedings under the charter were had as resulted in a verdict from which an appeal was taken to the circuit court, where on a trial anew, before a jury of six men, there was a verdict and judgment from which the two Hulings on the one part, and said Swope on the other,

have made separate appeals and thus brought the case here for review.

To this end separate "agreed statements," under rule 20 of this court, were made between these appellants, the Hulings and said Swope on the one side, and the City of Kansas the plaintiff on the other, showing the cause of action, the defence and the evidence together with the rulings of the court thereon, and the exceptions saved to said rulings; which statements under said rule are here to be treated as the records in said respective appeals, and the causes therein considered and adjudged accordingly. By agreement in this court these two appeals or causes were argued and submitted together, and for convenience will in like manner be considered and determined together in one opinion.

The "agreed statement" in the Swope appeal, as far as material is as follows: The first exceptions saved were as follows:

"The cause coming on to be heard, it appeared that the judge of the court has chosen the following named persons as jurors in this case (here follow six names.) At this point defendant, Thos. H. Swope, objected to the jury because it consisted of but six men, and at the same time requested a jury of twelve men, but the court overruled his objection and denied his request, to which action of the court said defendant at the time excepted. Upon examination under oath, said jurors testified that they owned real estate and were freeholders in the City of Kansas, but had no interest in any real estate covered by this proceeding, at which point defendant, T. H. Swope, objected to the jury on the ground that they were not disinterested, but were directly interested, inasmuch as it would be to their interest to assess as little benefits as possible against the city, they and their property having to pay a portion of the same, which objection the court overruled, to which action of the court in so overruling said objection defendant, T. H. Swope, at the time excepted."

On the question of the benefit to the city, by the proposed improvements, all witnesses swore it would be of some benefit. One swore it would not be large. The city engineer testified that one-tenth of the benefits should be assessed against the city. Six witnesses fixed it at from five per cent to thirty per cent. Witnesses were introduced to prove the value of the ground proposed to be taken.

On cross-examination defendant, Swope, asked the following question: "Does not the fact that the real estate proposed to be taken lies, and has lain for a great many years in the line of Eighth street and between the east and west parts of said street already opened diminish the value thereof?"

The owners of said real estate objected to the question, to which action of the court defendant at the time excepted. Reference is here made to the map with the transcript in this court. It shows the ground taken to be a strip of ground between two portions of Eighth street, the object of the condemnation being to make a continuous street. Defendant, Swope, introduced six witnesses, experts in the value of real estate in Kansas City, who testified that the lot on the corner of Delaware street and the proposed improvements, would be benefited from twenty to twenty-five per cent, of the value of the same, from the fact of being made a corner lot, and no more, taking into consideration · that the street would have to be graded, curbed and guttered and sidewalked, for which the corner would be taxed; and upon this point, this was all of the evidence, and the evidence of the value of this lot was, that it was the same as that of the north twenty feet upon Delaware, taken by the proposed improvement. By a corner lot, said witness testified, they meant one having a front of from twenty to twenty-four feet.

This lot so cornering on Delaware and the proposed improvement, was designated on plat (map above referred to) as lot 13, in block 3, T. H. Swope's second addition, said lot having a frontage on Delaware of 44 3-10 feet; and

said witnesses further testified that the rest of said lot would be benefited about five per cent of the value thereof. By their verdict the jury found the north twenty feet of the land taken on Delaware street to be worth \$276.66-100 per front foot, hence the lot on the corner, taking it at a front of twenty-four feet, would be worth \$6,639.85, and at the same rate the whole of lot 13 would be worth \$12.394.35: assessing the benefits at the highest per cent fixed by any witness, to-wit, thirty per cent on twenty-four feet, and five per cent on the rest, and they would amount to \$2,279.70. yet the jury assessed the benefits against this lot at \$3,500. They assessed the rest of this ground as follows: Lot 11, \$1,500; lot 12, \$1,500; lot 14, \$700; lot 15, \$300; a strip at the end of the lots, \$500, making an assessment of \$8,000 for benefits against the land of defendant Swope. owners of the strip of ground condemned, were allowed \$28,400, and the benefits assessed against the city were \$1.

The "agreed statement" in the Huling appeal, is to

the effect following:

"On the question of benefit to the city by the proposed improvements, all of the witnesses swore it would be of some benefit. One swore it would not be large. The city engineer testified that one-tenth of the benefits should be assessed against the city. Six witnesses fixed it at from five per cent to thirty per cent. Witnesses were introduced to prove the value of the ground to be taken. Reference is here made to the map with the transcript in this court. The said map shows the ground to be taken to be a strip of land between two parts of Eighth street, the object of the proceedings being to connect the two parts of said street and make said street continuous. Said defendant, Geo. D. Huling, introduced six witnesses, who were experts in the value of real estate in Kansas City, and they testified that the lots on the corner of Delaware street and the proposed improvement, would be benefited from twenty to twentyfive per cent of the value of the same, and no more, taking into consideration that said street would have to be graded,

curbed and guttered and sidewalked, for which the corner would be taxed, and upon this point this was all the evidence. By a corner lot, said witness testified they meant one having a front on Delaware street of from twenty to twenty-four feet. The lot cornering on Delaware street and the proposed improvements, belonged to defendants Geo. D. Huling and Lucy S. Huling, was designated on the plat as part of lot 194, Ross & Scarritt's addition to the City of Kansas; said lot is a very narrow strip of ground which extends along the west side of said Delaware street, lying in a triangular shape. It extends along and fronts upon said Delaware street for the distance of 131 feet. Forty front feet of this strip the plaintiff proposed, in the proceedings, to take for the opening of said Eighth street. The deepest part of said strip is at the south end thereof, where it extends back from the west line of said Dalaware street twenty feet and ten inches, and from that line it gradually grows more shallow until it runs to a point. Where said strip would corner upon Delaware street and Eighth street, after the latter has been opened, as proposed in this proceeding, the depth would be something less than eight feet; accordingly, of the strip remaining, there would be left, after the north forty feet had been taken by the opening of Eighth street, a piece of ground that would front on Delaware street ninety-one feet, the greatest depth of which would be twenty feet, and the least eight feet. This piece of ground appears on the plat hereto attached, as that upon which are written the names of Geo. D. Huling, this appellant, and Lucy S. Huling, said plat being a copy of the plat furnished by the plaintiff to be used in these proceedings and prepared by the city engineer, as provided by law, which shows the location of the property of the appellant, Huling, with reference to the proposed street. The agreed statement contains a copy of the original plat, with the names of the owners of property to be assessed with benefits, and within the benefit district, as required by the city charter. Said strip was valued by the witnesses

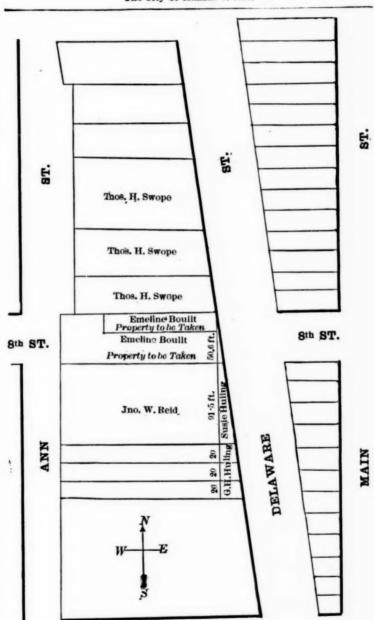
at \$50 per front foot on Delaware street, and this valuation was put upon the forty feet of said strip which would be needed for said improvement, and which the plaintiff proposed to condemn in these proceedings; one witness testified that the forty foot strip was worth \$75 per front foot. Said witness further testified that the balance of said lot or strip belonging to said George D. Huling, would be benefited about five per cent of the value thereof. The witness testified that the value of this strip of ground arose wholly from the fact that it excluded the property in the rear thereof from access to a business street, and that it was only worth what the owners of the property in the rear thereof could afford to pay for it, in order to obtain for their property a front on Delaware street. That of itself it had no value, because it was not deep enough to be used for any business purpose profitably upon Delaware street; that the business transacted upon said street is done by firms engaged in the wholesale business almost exclusively. All the witnesses testified that property of full depth upon Delaware street, upon the west side thereof, and within the district prescribed by the common council as that deemed by it to be benefited by the proposed improvement, to be worth from \$300 to \$400 per front foot. and that upon the other side of the street, although not so deep, to be worth considerably more, because it extended through to another street used for retail business. corner lots of twenty-four front feet were valued twentyfive per cent higher than inside property."

Accompanying the Huling abstract is a diagram ex-

planatory thereof, which see next page.

At the close of the testimony, the court gave a number of instructions, some at the instance of the plaintiff, and others at the instance of various parties defendant, but it is deemed necessary here to insert but one of the number, so given, over the objections of these appellants, and to the giving of which, these appellants duly excepted. That instruction is number five, and is as follows:

The City of Kansas v. Hill.



5. The jury are further instructed that they are the exclusive judges of the value of the property taken, and of the benefits to property within said district, they are not bound to find in this case according to the evidence, such evidence is only intended for the purpose of furnishing the jury information, and they may wholly disregard the same and make their finding from their own observation alone, and they are authorized to take into consideration the location, situation and also the surrounding circumstances connected with any or all the property involved, both that taken and subject to the assessment with benefits.

The causes here relied on by these appellants for a reversal, are: 1st, The number and competency of the jurors; 2nd, The refusal of the court to allow defendant Swope, on cross-examination, to ask the following question: "Does not the fact, that the real estate proposed to be taken lies, and has lain for a great many years, in the line of Eighth street, and between the east and west parts of said street, already opened, diminish the value thereof." 3rd, That the assessment of "benefits" against the city was too small; 4th, That the several assessments of "benefits" against these appellants, were excessive and unauthorized by the evidence in the cause; 5th, That instruction number five was error.

On the other hand, it is objected by the city, the plaintiff, and on behalf of Reed, Brumback and others, who were parties defendants to the proceedings, but who acquiesced in the several assessments against them, and are not parties to these appeals of the Hulings and Swope, that this court cannot reverse in any event, because the case is not here according to rule 20 of this court; that the agreed statements were made by the city, on the one side, and by Swope and the Hulings on the other; and that no statement according to rule 20 could be made, unless all the parties to the proceedings agreed thereto.

As to the first point, the number and competency of the jurors, the city charter provides that: "On appeal,

under this section, the jury shall consist of six men, free-holders of the city, and be chosen by the judge." Under this express provision of the charter, as well as the weight of authorities cited in briefs of counsel, we think the objection is not well taken.

On the second point, we are unable to see any valid reason why the question might not be asked and answered. Like any other fact, it is a circumstance in the case, tending to show the value of the property in question, and might well be taken into consideration by the jury in estimating the value. How much weight it might or ought to have, is for the jury to determine. Its position between the two ends of the street sought to be connected, and its liability thus to be taken, might well enter into its market value, since purchasers, desiring to improve for business or residence purposes, might well hesitate to invest in property thus liable to be taken. Its exclusion by the court, we think, was error.

The third and fourth objections may be taken and considered together. The charter provides, (§ 3, p. 245): "That the jury shall first ascertain the actual damages done to each person or corporation, in consequence of the taking of their property for such purposes, without reference to the proposed improvement, as the just compensation to be made therefor; and second, to pay such compensation, assess against the city the amount of benefits to the city and public generally, inclusive of benefit to any property of the city, and against the several lots and parcels of private property deemed benefited, as determined according to the last section; each lot or parcel of ground to be assessed with an amount, bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed."

Under this provision the actual value of the property sought to be taken was assessed, in the aggregate, at the sum of \$28,400. To pay for the same, the city was assessed with "benefit" to the amount of \$1. The property of the

appellant, Swope, was assessed with "benefit," in the aggregate sum of \$8,000; while that portion of the Huling propty, not taken, was assessed with "benefit" to the amount of \$3,025.48, and the part sought to be taken was valued at \$2,000. How this result was reached under the evidence in the cause, it is difficult to tell, unless that evidence, as suggested by instruction number five, supra, was wholly disregarded.

On the question of benefit to the city, the agreed statement shows that "all witnesses swore it would be of some benefit. One swore it would not be large. The city engineer testified that one-tenth of the benefits should be assessed against the city. Six witnesses fixed it at from five per cent to thirty per cent." As to the benefit assessed against the remnant of the Huling property not taken, if the evidence in the agreed statement is to have any weight, it would seem largely in excess of the actual benefit con-To a great extent, also, the same may be said of the benefits placed on the Swope property. But whether these assessments of benefits, in point of fact, be too low or too high, as claimed by appellants, from the view we have taken of these cases, need not now be determined, and we express no opinion on either of these points. A trial, under proper instructions, might have secured a different result.

The material and controlling question, however, before us, grows out of the giving of the fifth instruction, supra. The charter expressly provides that: "Parties interested may submit proof to the jury, and the latter shall examine personally the property to be taken and assessed." Why may the parties submit proof, if the jury are at liberty to disregard the same, and make their findings from their own observations alone? It would seem a farce to introduce evidence, if it may be wholly disregarded. Why go to all the trouble and expense, if the jury may make their verdict from their own observation alone. We do not say or intimate what weight or importance the jury may, or ought to

give the proof, so submitted; but when submitted, we think it is their duty to consider, and not wholly disregard it. If "such evidence, (in the language of the instruction,) is only intended for the purpose of furnishing the jury information," what is the use of furnishing such information, if it may be utterly disregarded. It may be conceded that if the parties interested decline to submit any proof to the jury, that it would be perfectly competent for them to make up their findings and assessments from their own personal examination of the property. The charter expressly makes it their duty to examine personally the property to be taken and assessed. This duty they must perform, whether the parties in interest submit their proof or decline to offer any. The object of the statute, in this particular, it would seem, was to afford the jury this additional means of information, rather than authorize them to ignore and disregard the common law source of information derived from the testimony of competent and intelligent witnesses. This instruction, therefore, both under the charter and authorities cited by counsel, was error.

The only remaining question is the objection here urged by the city, and also on behalf of Reed, Brumback and others, that the appeals are not here according to rule 20 of this court. That rule provides that: "Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defence and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any ruling, which may intelligibly present to the Supreme Court, or any appellate court, the matters intended to be reviewed; and this statement, with a certificate of the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by the Supreme Court respecting the same."

This was a proceeding, as we have seen, begun by the City of Kansas, under and in pursuance of its charter, to establish, open and extend Eighth street from Delaware to Wyandotte: to condemn and appropriate private property for that use, and to provide the means of paying therefor, by the assessment of "benefits" against all private property, within certain limits, deemed benefited thereby. The City of Kansas was the actor, the party plaintiff, in these proceedings, and all parties owning the property thus sought to be taken and assessed with benefits, were, by it, made parties defendant in said proceedings. The proceedings, however, were special in their object and character, each lot or tract of land being separately assessed and charged with the amount of benefit supposed to be conferred thereby, and to enforce the same separate special judgments and executions were rendered and ordered accordingly. charter then provides that: "In case the city, or any defendant to such proceedings, shall feel aggrieved by the verdict of the jury, such party so aggrieved, may,

appeal to the circuit court in and for the county of Jackson, in this State." The charter further provides, in substance, that upon such appeals, the circuit court shall become possessed of the cause and try the same de novo, by a jury of six men, (unless a jury is waived,) chosen by the judge; the charter also provides that: "No assessment shall be affected, or interfered with, for the reason that any other assessment, or assessments, made in the same proceedings may be invalid, in whole or in part." There is a further provision that: "Tax-bills filed and recorded as aforesaid, shall be subject to the order of the court, and may be set aside, or the amount of the assessment reduced, on motion of any party interested in the property assessed, the city having reasonable notice of the filing of such motion and the object thereof." There is still another provision, which declares that: "If the city fail to collect any assessment, in whole or in part, it may pay the amount, so not collected out of the city treasury." From all which we

think it quite manifest that under rule 20, and these charter provisions, as well as the authorities cited, that the City of Kansas, on the one side, and the parties appellant on the other, are to be deemed and held as the parties authorized and empowered, in a case like this, to enter into and make the agreed statement contemplated in said rule 20. The city institutes the proceedings in its own name, and although all parties owning property within the prescribed district are made parties defendant, yet the object and purpose of the proceeding is to impose and enforce a separate and distinct charge against each separate and distinct tract of land, and the owner of every such tract or lot, for the purpose of this proceeding, is treated and held as a separate and distinct party defendant, and as such, must be held to be a "party" within the meaning of rule 20, supra. His interest is adverse to that of the city, and separate and distinct from every other party defendant, and upon appeal, no reason, in principle or policy, is seen why he and the city may not make the stipulation and statement contemplated in rule 20. This being so, it is, perhaps, unnecessary to inquire or decide whether the city, after having made the agreed statement in question, ought now to be heard to call in question its validity; and, in like manner, whether Reed or Brumback, who acquiesced in the several assessments against them, and are not parties to these appeals, have any standing in court, or right to be heard, in opposition to these appellants. This question, however, need not be passed upon.

For the reasons hereinbefore stated, each of the several judgments of the circuit court, herein appealed from, is reversed and the said several causes remanded for further proceedings, in conformity to this opinion. All concur.

Hawley v. The Missouri Pacific Railway Company.

Hawley v. The Missouri Pacific Railway Company, Appellant.

Appeal from Justice's Court, when Triable. Where an appeal from a judgment of a justice of the peace was not taken on the day it was rendered, and no notice of appeal was given, and the appellee did not enter his appearance on or before the second day of the first term of the appellate court, it is error for such court to hear the case and render judgment at such first term.

Appeal from Buchanan Circuit Court.—Hon. J. P. Grubb, Judge.

REVERSED.

Smith & Krauthoff with T. J. Portis for appellant.

No notice of the appeal having been given, and the appellee not having entered his appearance on or before the second day of the first term of the circurt court, (R. S., § 3056,) the case should have been continued as a matter of course. It could not be legally tried without defendant's consent, and the judgment must be reversed. Blake v. Downey, 51 Mo. 437; Nay v. Railroad Co., 51 Mo. 575; Chrismer v. Railroad Co., 54 Mo. 152; Transier v. Railroad Co., 54 Mo. 189.

S. B. Green for respondent.

Norton, J.—This suit was brought before a justice of the peace, and judgment by default was rendered for plaintiff, and, after the refusal of the justice to set the same aside on motion of defendant made within ten days after the rendition of judgment, defendant appealed to the circuit court of Buchanan county. This appeal was returnable to the September term, 1880, of said court, which began on the first Monday of that month. As the appeal was not taken on the day the judgment was rendered, and as the record does not show that the defendant either gave notice of appeal, or that plaintiff entered his appearance on or

before the second day of the term, the circuit court erred in proceeding at said term to hear the case and render judgment, and in refusing to sustain the motion of defendant for new trial based on that ground. Nay v. H. & St. J. R. R. Co., 51 Mo. 575; Blake v. Downey, 51 Mo. 437; Transier v. Railroad Co., 54 Mo. 189, and Blakely v. Mo. Pac. R'y Co., 79 Mo. 342.

Judgment reversed and cause remanded for the error above indicated. All concur.

Colbern et al., Appellants, v. Robinson.

- Mortgage: CREDITOR: PREFERENCE. A debtor has the right to execute a mortgage to secure a note due one creditor, although such mortgage has the effect to hinder and delay his other creditors.
- Security: FRAUD. The mere fact that the security given to secure a note is more than is necessary, is, of itself, no indication of fraud.
- 3. Mortgage: EFFECT OF. A mortgage given to secure the payment of a note, will not have the effect to withdraw the property included in it from the reach of creditors, and judgment creditors, whose judgments against such mortgaged property were rendered before the maturity of the note secured by the mortgage, and before the sale thereunder, may redeem the property from the mortgage, or protect themselves by bidding at the sale, or enjoin the sale until the validity of the mortgage debt can be ascertained.
- Fraud: CREDITORS. Although a debtor has been overreached and defrauded in a business transaction, this is not a matter of which his creditors can take advantage.

Appeal from Johnson Circuit Court.—Hon. Noah M. Givan, Judge.

AFFIRMED.

E. A. Nickerson, G. N. Elliott and Comingo & Slover for appellants.

The note and deed of trust were fraudulent and void,

because given for a sum largely in excess of the amount actually due from Holwell to respondent, and for the purpose of hindering and delaying creditors. Kerr on Fraud, 196, note, 192, 195; Bump on Fraud. Convey., 85, 239, 272; Sands v. Codwin, 4 John. 585; Curtis v. Leavitt, 15 N. Y. 9; Small v. Beachly, 2 Vt. 602; Allen v. Berry, 50 Mo. 90; Pettibone v. Stevens, 15 Conn. 19; Young v. Wilson, 24 Barb. 510; Armstrong v. Winfrey, 61 Mo. 358. If the deed of trust is void for fraud, there can be no re-imbursement, and the title of plaintiff must be quieted. Bump on Fraud, 573; Borband v. Walker, 7 Ala. 269; Butts v. Peacock, 23 Wis. 359; Webb v. Brown, 3 Ohio St. 246; Bean v. Smith, 2 Mason 296; Jackson v. Marshall, 3 Am. Dec. 695; Bigelow v. Stinger, 40 Mo. 195; Pilling v. Otis, 13 Wis. 495.

John J. Cockrell and O. L. Houts for respondent.

A deed executed by a debtor to a creditor, in good faith, is good as to the whole world, even though there be other creditors, and they be neither secured nor paid. A fraud upon creditors consists in the intention to prevent them from receiving their just dues by an act which withdraws the property of the debtor from their reach. This is true as is the converse, that where the necessary consequences of a debtor's acts are to deprive his creditors of their debts they are fraudulent, however pure his motives. Bump on Fraud. Convey., (2 Ed.) pp. 19, 22, 23, 24, 25, 26. The creditors of a party defrauded have no right even though the fraud has the effect to diminish his means of paying them, to look into such fraud and unravel it. The right is a personal one. Bump on Fraud. Convey., (2 Ed.) pp. 17 18; Eatin v. Perry, 29 Mo. 96. The testimony of the debtor as to a conveyance, is merely his opinion of the transaction, and is of little value. The deed must be tested by rules established by law and experience. Potter v. McDowell, 31 Mo. 62, 74; Bump on Fraud. Convey., (2 Ed.) pp. 574, 575. In equitable cases where there is substantial evidence to

support a finding, the appellate court will not enquire into its weight. *Hedges v. Black*, 76 Mo. 537.

Hough, C. J.—On the 2nd day of August, 1877, James Holwell executed a deed of trust conveying to I. W. Rogers, as trustee, certain land in Johnson county to secure the payment of a promisory note for the sum of \$2,483, made by said Holwell to the defendant, and payable on the 2nd day of August, 1878. The real estate covered by the trust deed was worth about \$10,000. Holwell also owned at that time 120 acres of land in Henry county, and personal property worth nearly \$4,000, and owed in addition to the note secured by the trust deed, other debts

amounting to \$2,500.

On the 18th of June, 1878, the Warrensburg Savings Bank recovered two judgments against Holwell; one for \$375 and one for \$379.13; and on June 19th, 1878, the Johnson County Savings Bank recovered judgment against Holwell for \$515.95. Under the two judgments first mentioned, the real estate covered by the deed of trust was sold to E. A. Nickerson, for the sum of \$10.50, and passed by sundry mesne conveyances to the plaintiff, the Warrensburg Bank; and under the judgment last mentioned, said real estate was also sold to the plaintiff, Colbern, for the sum of \$9. On the 9th of Sept., 1878, the defendant sold the land under the deed of trust, and purchased the same at said sale. In Nov., 1878, the plaintiffs instituted this suit to set aside the trust deed and the sale thereunder, and to divest the defendant of title and invest plaintiffs therewith, on the ground that said trust deed was fraudulent and void as to creditors. The petition alleges that the note secured by the deed of trust was for the sum of \$1,368.38 in excess of the real indebtedness of Holwell to the defendant when said note and deed were executed; and, after setting forth that said Holwell was enfeebled in mind and diseased in body, and greatly disturbed and distressed by reason of certain family dissensions which

culminated in an assault upon his wife, proceeds as follows: "Your petitioners further charge that at the date of the execution of said trust deed the defendant well knew the said Holwell was so far impaired in the faculties of his mind as to be mentally incapable of the government of himself and the management of his own affairs and business, and was so physically weak and melancholy and despondent, by reason of the disease with which he was then afflicted, and the difficulty with his wife, and the prospect of his indictment and punishment, as steadily kept before his mind and pressed upon him by said defendant, that he was entirely in the power of said Robinson, and executed and signed whatever papers he was directed to by said defendant, without any active memory in the premises, or exercising any reason or judgment in the matter.

"Your petitioners charge that the flattery, false pretense, cunning, undue means, tricks and subterfuge brought to bear upon the said Holwell by said defendant, in connection with the then known bodily and mental disease of the said Holwell rendered him powerless in the hands of defendant to protect himself and to transact any business save as di-

rected by the said defendant."

After thus stating facts which, in connection with other matters alleged, would afford sufficient ground for a suit by Holwell to set aside said deed of trust as to excess of said note over his real indebtedness, the petition, at some risk of inconsistency, proceeds as follows; "Your petitioners further charge that although it is true that at the time of and prior to the execution of said deed of trust the said defendant well knew that said Holwell was then a man of weak understanding; was harassed with his nervousness, in great despondency and was overwhelmed with calamities and was of so great weakness of mind as to be unable to guard against imposition or resist importunity and undue influence, yet the said defendant, knowing that the said Holwell confided in him and acted upon his advice and opinion, combined and confederated with the said Hol-

well and induced him to execute to him said fraudulent deed of trust, with the purport and intent on the part of said defendant and said Holwell to hinder, defraud and delay the creditors of said Holwell out of their lawful actions, damages, forfeitures, debts and demands and to give the said defendant an unjust, corrupt and fraudulent advantage and preference, and to defraud and cheat the said Johnson County and Warrensburg Banks; and the plaintiffs charge that said Holwell fully and well knowing that said acts were corrupt and fraudulent, and intended to give the said defendant a corrupt and fraudulent advantage, and to cheat and defraud said banks out of the amounts due them; yet the said Holwell consented thereto and aided, assisted and contrived with said defendant to so fraudulently incumber his property as aforesaid, with the intent to cheat and defraud said banks; and plaintiffs charge that said deed of trust and all conveyances thereunder are clearly and utterly void, and should be held for naught." All of the foregoing allegations were put in issue by the defendant's answer. The circuit court found the issues for the defendant and dismissed the petition.

The testimony is quite voluminous, and no principles of law would be elucidated by stating it in detail. Plaintiffs' counsel, in an elaborate pains taking examination of the numerous business transactions between Holwell and defendant, have endeavored to show that the note was for a sum largely in excess of the amount actually due from Holwell to him, and to deduce from this alleged fictitious indebtedness and certain statements from Holwell, the conclusion that the note and mortgage, as we shall hereafter term the trust deed, were made to hinder and delay the other creditors of Holwell. We have read the testimony with great care, and it falls far short of convincing us that the amount secured by the mortgage was in excess of the real indebtedness of Holwell to the defendant.

Holwell's testimony, which is chiefly relied on to establish the excess in the note, and the fraudulent purpose

in executing the mortgage, is confused and contradictory, and, therefore, far from satisfactory. Being the party who executed these instruments, his testimony, in order to be made the basis of a decree, should be consistent, clear and convincing. The detailed account of their various transactions given by the defendant, and the admissions of Holwell to various parties, from some of whom he sought to borrow money to pay this very note and other debts, and the direct testimony of two witnesses who computed the amount of, and interest on, the several obligations held by the defendant, before and at the time they were consolidated in the note of August 2nd, 1877, establish, to our satisfaction, that said note correctly represented the amount then due from Holwell to the defendant. As the note correctly represented the amount due at the time. Holwell had an undoubted right to secure its payment by the execution of the mortgage in question, even though the effect of the mortgage, which is not conceded, was to hinder or delay his other creditors. Shelley v. Boothe, 73 Mo. 74. But there is no sufficient evidence of any intent on the part of Holwell to delay or defraud his creditors. One of the strongest statements, perhaps, of Holwell on this subject is the following: "I gave him the deed of trust so as to secure him to the amount that I owed him; and in the second part I done it to secure my property from my wife and her father, that would hold it against him if he made a break on me and put me into the penitentiary, and save it for my children; it was not from my creditors altogether that I done it, because what debts I owed I was able to meet at any time. There were no debts pressing me. There weren't a dollar pressing me." Elsewhere in his deposition, he states that he would not have executed the mortgage but for the difficulty with his wife, and the impression made upon his mind that his wife and her father would endeavor to take his property from him. There are strong indications that the defendant fostered this idea in the mind of Holwell, but we have failed to discover any

good ground for holding that the defendant had knowledge of, or participated in any design on the part of Holwell to defraud his creditors, even if it be conceded that Holwell. himself, entertained such a purpose. The security given was, it is true, more than was necessary to secure the note; but this of itself amounts to nothing. Holwell was, undoubtedly, under a morbid fear of penal consequences, and loss of property, on account of his assault on his wife, and thought, perhaps, by including all his real property in Johnson county in the mortgage, he would thereby secure it to himself and to his children. The defendant's mortgage did not have the effect of withdrawing the property included in it from the reach of creditors. It was subject to the judgments under which the plaintiffs claim, they having been rendered nearly two months before the maturity of defendant's note and nearly three months before the sale. They could have redeemed the land from the defendant's mortgage, (Jones on Mortg., § 1069,) or protected themselves by bidding at the sale under the mortgage, or enjoined the sale until the validity of the defendant's debt was ascertained; but they have chosen a different course. Colbern, one of the plaintiffs, held a junior incumbrance and refused to redeem from the defendant's claim. Besides, there was personal property amply sufficient to satisfy their judgments at the time they directed their executions to be levied on the land in question. These facts have a tendency to invest the plaintiffs' claim with something of a speculative character, and to deprive it of the commendatory aspect of a simple endeavor to collect the amount of their debt.

The testimony shows that \$1,000 of the amount for which the note was given was money borrowed from defendant by Holwell for the purpose, as he states in his testimony, of extricating himself from the trouble he was in on account of the assault upon his wife. \$550 of this sum is clearly shown to have been paid by the defendant, according to the directions of Holwell, and for his benefit. The

remaining \$450, according to Holwell, was never received by him, or appropriated to any use designated by him, but was misapplied by the defendant for the benefit of himself and others. There is a conflict of testimony as to this. But, even if Holwell had been overreached and defrauded to the extent stated, that is not a matter of which his creditors could take advantage. This is well settled. Bump on Fraud. Con., 65. Holwell may have been entitled to some relief as to this matter; and the record shows that on the 1st of August, 1878, he instituted proceedings to set aside the mortgage given to the defendant. The defendant does not appear to have been enjoined from selling. however, and, after the sale took place, Holwell and his wife joined in a deed to the defendant of the premises sold in consideration of the sum of \$1,500 paid to Mrs. Holwell and \$150 paid to her son for wheat sowed by him and a lease of the premises until the February following.

We are of opinion that the circuit court properly disposed of the case and its judgment will be affirmed. All

concur, except Sherwood, J. who dissents.

MICHAEL, Appellant, v. Locke et al..

- Guardian of Insane Person: ESTATE, AUTHORITY AS TO. A guardian of an insane person has no authority to subject the estate in his charge, to the risks and hazards of any trade or business undertaking.
- STATUTE: PROBATE COURT. Such power is not conferred on the guardian by statute, nor have the probate courts the equitable jurisdiction to give it.

Appeal from St. Louis Court of Appeals.

AFFIRMED,

James Taussig for appellant.

A guardian of an insane person has power to continue the business of his ward, if such continuance is essential for the preservation and protection of the estate of the insane person. 1 Wag. Stat., § 40, p. 716; Ib., § 19, p. 714; Reed v. Wilson, 13 Mo. 28. Trustees, executors and administrators are personally liable on contracts entered into by them for the benefit of the trust estate, in the absence of an express provision in the agreement to the contrary. Noyes v. Blakeman, 6 N. Y.; News v. Nicoll, 19 N. Y. S. Ct. 431; 17 Alb. L. J. 292; Meyer v. Cole, 12 John. 549; Demott v. Field, 7 Cow. 78; Reynolds v. Reynolds, 3 Wend. 244; Ferrin v. Myrick, 41 N. Y. 315; Austin v. Munroe, 47 N. Y. 361. A trustee or guardian has a lien upon the estate for all money properly advanced and expended by him in the administration of the trust, and would, therefore, be entitled to be re-imbursed out of the estate for all money paid by him on contracts made for his benefit. Perry on Trusts, (2 Ed.) § 907. No right against the estate can exist at law. Haversham v. Huquein, R. M. Charlton 378 (Law J.) If, however, the trustee or guardian is insolvent, and a contract has been made with him, which was necessary and proper in the administration of the trust, and of which the estate, the cestui que trust, or ward, has received the benefit, the creditor may proceed against the estate itself to enforce payment of his demand. Poole v. Wilkinson, 42 Ga. 539; Owens v. Mitchell, 38 Tex. 588. See Copley v. O'Neil, 39 How. Pr. 47; Westmoreland v. Davis, 1 Ala. 293.

George A. Castleman for respondent.

Jones, the former guardian, to whom the sales of the wood were made, was personally liable therefor at law. Blakely v. Bennecke, 59 Mo. 193; Hills v. Bannister, 8 Cow. 31; Sumner v. Williams, 8 Mass. 162; Hill on Trustees, (3 Am. Ed.) 533, 534; Schouler's Dom. Rel., (2 Ed.) 457;

Forster v. Fuller, 6 Mass. 58. The prosecution of the business by Jones with his ward's estate, was unlawful, and a breach of duty on the guardian's part. Western, etc., v. Jones, 8 Mo. App. 373; Merritt v. Merritt, 67 Mo. 156. Plaintiff cannot come in upon the trust fund. Hill on Trustees, (3 Am. Ed.) 533; Warrol v. Harford, 8 Ves. J. 8. In all cases cited by plaintiff's counsel, the distinct ground of equitable interference was, that the debt had been incurred for the benefit of the trust estate, and for the actual betterment thereof, and in obedience to and advancement of the objects of the trust.

Martin, C.—This was a suit in equity for the purpose of enforcing against the estate and assets of an insane person, a demand incurred by his guardian after he had taken charge of the estate.

The circuit court sustained a demurrer to the petition, and the plaintiff declining to plead further, final judgment went against him. The court of appeals affirmed the judgment, and the plaintiff has appealed to this court. The only question for us to determine, involves the action of the circuit court in sustaining the demurrer.

It is alleged in substance that Joseph H. Locke was adjudged insane by the St. Louis probate court, and that one Robert L. Jones was, by said court, appointed as his guardian, who assumed control and management of his estate and person; that prior to said appointment said Locke had been engaged in the business of buying and selling and manufacturing lime and cement, and had built up a large and profitable trade at great expense of time, labor and money; that for good and sufficient reasons, it was deemed best, for the interest of Locke and his estate, by the guardian, wife and family, that the business so established should be carried on as before, so as to prevent a sacrifice of property, and afford an income for the maintenance of himself, wife and family; that in pursuance of said determination, the guardian did carry on the business from the date of his ap-

pointment; that in conducting said business it became necessary to purchase, from time to time, large quantities of wood for the purpose of heating lime-kilns; that the guardian had no money on hand for that purpose, and was obliged to purchase wood to be paid for in the future; that plaintiff agreed to furnish and did furnish to said guardian wood in the value of \$6,525.35, and that after deducting all credits and payments, there remained due to plaintiff on account thereof \$2,932.25, as disclosed in the exhibit filed; that all of said wood was necessary for the purpose of carrying on the said business, and to prevent loss and sacrifice of property to the estate, and that the estate derived great actual benefit therefrom, in an amount greater than the price of the wood; and that it was understood and agreed between plaintiff and the guardian, that the plaintiff should have a lien on the assets of the estate for the wood so furnished. It is added that said Jones, as guardian, has been relieved of his office by order of court, and that Lancaster has been appointed as his successor, and that said Jones is insolvent, and that his successor refuses to pay the demand sued for. It concludes with a prayer that the demand be adjudged a lien upon the estate of said Locke, and that the present guardian be ordered to pay the same out of the assets of the estate held by him, and that in default of payment, so much of the estate be sold as may be necessary to satisfy the demand, and for general relief.

The counsel for plaintiff submits an able and exhaustive brief in support of the petition. But I am unable to agree with him about the propositions he advocates. I have reached the conclusion that the courts below were right in holding that the petition was wanting in equity. The guardian of an insane person is a trustee, and his conduct in the management and control of the estate committed to his charge, except as otherwise provided in the statutes, is governed by the law of trusts. As such trustee, he has no authority to subject the estate in his charge to the risks and hazards of any trade or business undertaking. Such is the

general doctrine on this subject. When he employs the assets of the beneficiary in trade or speculation, or in the establishment or continuance of a manufacturing business, as was done in this case, he does it in violation of the trust by which he holds them.

I am not aware that equity has ever approved any departure from this rule, in the absence of express authority to that effect. When a will or other instrument creating or defining the trust authorizes such employment, the trustee is justified in making contracts which shall be binding upon the assets in his hands, provided he has strictly pursued the terms of his authority. We have had occasion recently to consider the right of an executor to bind the assets of his testator, by subjecting them to the risks and hazards incident to a continuance of the business of the testator after his decease; and we held that in the absence of express authority from the testator in his will, or other binding instrument, the executor was not possessed of any such authority. Exchange Bank v. Tracy, 77 Mo. 594. will not pretend to say that a court of equity having charge of an estate may not, in the exercise of its ancient and rightful jurisdiction, furnish authority to the receiver or trustee managing the estate, to continue the prosecution of a trade or business enterprise.

In such case the authority of the receiver or trustee would rest upon the order of the court. Our probate courts do not possess such equitable jurisdiction over the estates held by officers accounting before them. Neither is it alleged in the petition that the probate court assumed to give to the guardian in this case any authority to continue the business of manufacturing and selling lime which had been conducted by Mr. Locke before he suffered the loss of his reason. The fact that the plaintiff has found it necessary to resort to a court of equity, is a persuasive argument against the assumption that the probate court ever authorized or had authority to authorize the guardian to incur the lien which the plaintiff now asks to be en-

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forced against the estate. Neither has it been an uncommon thing for equity to adjudge a lien against funds in the hands of a trustee, for expenditures incurred in protecting, and saving them against loss and damages, where the expenditures have been incurred solely with that view, and especially when they have resulted in a benefit to the funds for which they were incurred. No such case is contained in this petition. The guardian continued the manufacturing business of Mr. Locke for the purpose of affording a better income to his beneficiary and the family. It is, also, alleged that this was necessary to save and preserve the assets from sacrifice; in other words it was necessary to commit a breach of trust in order to preserve the trust property. Equity cannot recognize the necessity of the situation as sufficient to confer such an extraordinary power. I may add here that something more than is stated in this petition is required to make apparent the propriety of subjecting the assets to the hazards of a manufacturing business in order to save them from possible loss or depreciation. Whenever trustees have been permitted in equity to burden the estates in their charge with the lien of obligations incurred by them for the benefit of the estates it will be found that such obligations have been invariably within the scope and powers of their trusts, and not in open violation thereof. To approve and enforce against the trust estate a debt incurred by the trustee in open violation of the trust, merely because it has turned out to be beneficial to the estate, would practically dispense with the time-honored restraints and safeguards, which equity has been so solicitous to maintain for the protection of trust estates. A relaxation of such restraints and guards would invite every trustee to employ the trust funds about as he pleased, and make his lawful authority dependent upon the outcome of his enterprise or speculation. But it is argued by counsel for plaintiff that the guardian of an insane person, from the very nature of his trust, is possessed of greater powers in respect to the emMichael v. Locke,

ployment and use of the trust funds, than the administrator or executor of a deceased person, or the guardian or curator of a minor. It is suggested that the insanity may be only temporary as was expected in this case, and that a restoration of mind would enable the beneficiary to resume his discontinued business, and from this is deduced the authority to keep up his business as he left it, a result not possible to the other trustees mentioned. This reasoning is not more than plausible. Undoubtedly it would be well for the lunatic to resume his business upon being restored to reason. But this is impossible; and the plaintiff's argument does not assume to do this. It assumes to restore to him not his business as he left it, but the business carried on and left by his guardian, burdened with debts and obligations which perhaps he would never have thought of incurring. The business as thus resumed by him may or may not be a fair substitute for the business he left.

The statute which defines the duties and powers of guardians of insane persons, by leaving out, impliedly excludes the power claimed by plaintiff. R. S. 1879 §§ 5800, 5804. The whole scheme of administration of the estates of insane persons as disclosed in the statutes, seems to negative the right of the guardian to embark in trade or business with the funds of his beneficiary. When the necessity for money to pay his debts or maintain his family arises, the law provides for a lease or sale of the assets. R. S. 1879, §§ 5806, 5808. There is nothing in the statutes to distinguish his general authority over the assets, from the authority of a guardian or curator of a minor, and his general duties seem to be about the same.

The power of the probate court to make orders for "the management of the estate" out of the proceeds of the estate, does not distinguish him from the guardian of a minor in respect to the employment of the funds. R. S. 1879, § 5805. The curator of a minor's estate has "the care and management of the estate of the minor subject to the superintending control of the court." R. S. 1879, §

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2578. The learned counsel for the plaintiff does not pretend that a minor's guardian or curator can carry on a trade or business for the benefit of his ward.

In holding that the assets of this estate are not legally subject to the lien of plaintiff, we have not found it necessary to consider the question, as to whether the guardian made himself liable individually therefor. He is not before us in this case, and the decision of the court of appeals on that or a similar issue in another case cited by counsel is not before us for review. Accordingly the judgment of the court of appeals affirming the judgment of the circuit court is affirmed. All concur.

GREER V. THE St. Louis, Iron Mountain & Southern Railway Company, Appellant.

- 1. Negligence: STATEMENT. Jackson v. St. Louis, Iron Mountain & Southern R'y Co., ante, p. 147, re-affirmed.
- Instructions. An instruction which is wholly unintelligible, is properly refused.

Appeal from Butler Circuit Court.—Hon. R. P. Owen, Judge.

AFFIRMED.

Smith & Krauthoff with T. J. Portis for appellant.

Plaintiff's statement does not state a cause of action. Bates v. Railroad Co., 74 Mo. 60, and cases cited; Asher v. Railroad Co., 79 Mo. 432. The instruction given on behalf of plaintiff was erroneous. Mumpower v. Railroad Co., 59 Mo. 245. Defendant's demurrer to the evidence should have been sustained. Davis v. Railroad Co., 65 Mo. 441.

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Edwin Silver and I. M. Davidson for respondent.

The statement is sufficient. Jackson v. Railroad Co., ante, p. 147. The instructions asked by appellant were rightly refused. The second is unintelligible.

Henry, J.—On the authority of the recent case of Jackson v. St. Louis, Iron Mountain & Southern R'y Co., ante, p. 147, the petition in this cause must be held good after verdict. The petition is as follows:

"Plaintiff states defendant is a corporation under the laws of the State of Missouri. That on the 17th day of May, 1879, in Neely township, in Butler county, and State aforesaid, and where its said railroad was not fenced, and where there was no crossing on said railroad, the defendant, by its agents and servants, while running its locomotive and train of cars on its said railroad, did then and there run over one fine horse, the property of plaintiff, and of the value of \$70, and thereby killed him; that defendant had failed and neglected to erect or maintain good or sufficient fences on the sides of its said railroad where said horse got on the track and was killed; that by reason of the killing of said horse as aforesaid, and by virtue of the 809th section of the Revised Statutes of the State of Missouri, judgment is prayed for \$140, being double the value of said horse killed as aforesaid, with costs."

From a judgment in plaintiff's favor, defendant has appealed.

Upon a trial on appeal to the circuit court, the plaintiff, to maintain the issues on his behalf, introduced the following testimony: James A. Greer, testified: "I am the plaintiff in the cause; the mare was killed on the 17th day of May, 1879; I valued her at \$65; she was mine." The defendant admitted that the mare was killed on the 17th day of May, 1880; was killed by train on defendant's railroad, as charged in plaintiff's statement.

The defendant introduced, to maintain the issues in his

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behalf, the following testimony: W. F. Neal, testified: "I sold Mr. Greer a horse and was to have the voucher when it come, or was to have the pay when it come; I claim to be the owner of the voucher when it comes; I consider that the voucher is mine when it comes; I paid for it and it belongs to me; Greer guaranteed payment at the time." Cross-examined: "If the claim is not paid by the railroad company, I hold Mr. Greer for it; he gave me an order for the voucher, and I sent it up to the railroad company."

James A. Greer, re-called by plaintiff, says: "I still consider that I owe Mr. Neal the \$65, if I don't collect." This was all the testimony introduced by either side.

Defendant then asked the court to give the following declaration of law, to-wit:

- 1. The court, sitting as a jury, declares the law to be, that under the testimony in this case, the plaintiff is not entitled to recover of the defendant.
- 2. The court, sitting as a jury, declares the law to be, that from the evidence in the case, the payment of Neal to Greer of the mare of Greer's, discharged the liability of the defendant to Greer.

Holding after verdict that the statement sufficiently alleges that the horse got on defendant's road at a point where the latter was by law required to fence, there was evidence to establish that fact. Defendant admitted that the horse was killed on the 17th day of May, 1880, by a train of defendant's cars, as alleged in the statement.

The court did not err in refusing the instruction asked by defendant. It is wholly unintelligible. Neal testified that he sold plaintiff a horse, and "was to have the voucher when it came, or was to have the pay when it came; that he was the owner of the voucher when it came. That Greer gave him an order for the voucher on the railroad company." What voucher, or on what account to be given, does not appear. Whether Neal or plaintiff ever received any voucher, is not shown. That plaintiff gave Neal an

order on the company for the amount of damages he claimed of the company for killing the horse, may be conjectured, but how that bars plaintiff's right to recover, in the absence of evidence that the company paid the money to Neal, is not perceived.

The judgment is affirmed. All concur.

LEGG, Appellant, v. DUNLEAVY et al.

Libel: WORDS ACTIONABLE PER SE: PLEADING. Words written of one alleging that he was a supervising architect of a building, and that he promised to and did give the defendants work thereon for a commission paid to him by them, are not actionable per se, and a petition in an action therefor, for libel, which fails to allege the extrinsic facts showing their libelous meaning, is fatally defective.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Taylor & Pollard for appellant.

A publication affecting one in his office or trade, if false, is libelous per se, and special damages need not be alleged or proved. Kimball v. Fennander, 21 Wis. 334; Pollard v. Lyon, 91 U. S. 226: Weiss v. Whitman, 28 Mich 366; Butler v. Homes, 7 Cal. 87; Wilson v. Fitch, 41 Cal. 386; White v. Nichols, 3 How. (U. S.) 285; Orr v. Scofield, 56 Me. 487. The meaning of the words "supervising architect" being commonly known, it was not necessary by prefatory allegations to aver their meaning. Bowman v. Piper, 91 U. S. 37; Wharton Ev., § 282; Bliss' Code Plead., § 187; Townsend on Slander and Libel, § 133; Elam v. Badger, 23 Ill. 498; Edgar v. McCutchen, 9 Mo. 448. Refusing plaint-iff's instructions one and two was error. Wilson v. Fitch, 41 Cal. 363; Weiss v. Whitman, 28 Mich. 366; Wilson v.

Noonan, 35 Wis. 321. The giving of defendants' instruction five was error. Instructions not predicated upon the evidence, should not be given. O'Fallon v. Boismenn, 3 Mo. 405; Hayes v. Bell, 16 Mo. 496; Franz v. Hilterbrand, 45 Mo. 121. Pleadings in libel are governed by the same rules as in other cases, with the one statutory exception, that the defendant may allege both the truth of the matter charged and any mitigating circumstances admissible in evidence, to reduce the amount of damages. R. S., p. 606; Atteberry v. Powell, 29 Mo. 429; Cable v. McDaniel, 33 Mo. 363; Buckley v. Knapp, 48 Mo. 157; Darrett v. Donelly, 38 Mo. 492; Adams v. Trigg, 37 Mo. 147. The libel published was not a privileged communication. Townsend on L. and S., 243; Taylor v. Church, 8 N. Y. 460.

T. A. & H. M. Post and C. F. Moulton for respondents.

The petition states no facts sufficient to constitute a cause of action. The affidavit was not libelous per se. See Towsh. Lib. and Sl., §§ 183, 190; Odgers Lib. and Sl., *65; Cooley Torts, p. 202; Nelson v. Brochemies, 52 Ill. 236; Orr v. Scofield, 56 Me. 483; Fowles v. Bowen, 30 N. Y. 20; Gal way v. Marshall, 9 Exch. 294; Ayre v. Craven, 2 Ad. & El. 2; Sibley v. Tomlins, 4 Tyrw. 90; Angle v. Alexander, 9 Bing. 123; Brayne v. Cooper, 5 Mees & W. 249. There is nothing in the affidavit from which the deduction may be legitimately drawn that the taking of commissions by plaintiff, as architect and superintendent, was calculated to degrade or injure him in his calling as such. Since the affidavit was not libelous per se, plaintiff was bound to show by extrinsic averments, what he has failed to show, that the language employed in the affidavit was in fact defamatory to plaintiff in his calling as an architect. McManus v. Jackson, 28 Mo. 58; Bundy v. Hart, 46 Mo. 164; Stewart v. Wilson, 23 Minn. 449; Kinney v. Nash, 3 N. Y. 177, 182; Curry r. Collins, 37 Mo. 329; Price v. Whitely, 50 Mo. 440, 441; Mosely v. Moss, 6 Gratt. 538; Geisler v. Brown, 6 Neb. 254;

Stone v. Cooper, 2 Den. 299; Moore v. Bennett, 48 Barb. 229. What the defendants meant or were understood to mean, is immaterial, unless the words themselves were of a defamatory character. Townsend on Libel and Slander, § 336, note 2; Starkie on Slander, top pp. 427, 422; Liebehardt v. Byerly, 53 Pa. St. 420; Bundy v. Hart, 46 Mo. 464; Caldwell v. Raymond, 2 Abb. Pr. 195; Fry v. Bennet, 2 Sandf. 54; Hunt v. Bennet, 19 N. Y. 173. The court committed no error as to the instructions.

EWING, C.—This is an action for libel by the appellant. Judgment in the St. Louis circuit court for defendants. Appealed to the St. Louis court of appeals where the judgment was affirmed and brought here for review. The judgment of the circuit court was affirmed upon the ground that the petition does not state a cause of action. And it will be therefore necessary to set out the petition in full which is as follows. The plaintiff complains and alleges:

That the plaintiff, on the 6th day of August, 1879, was, and for several years prior thereto, had been and still is an architect and superintendent, and as such was, had been, and still is carrying on the business as architect and superintendent in the city of St. Louis, and State of Missouri; and had always, as such architect and superintendent conducted and demeaned himself with honesty and fidelity, and had never been guilty of any misconduct or malpractice in his said capacity and profession of architect and superintendent. That by reason of said capacity and fidelity, the plaintiff in his capacity of architect and superintendent had on the 6th day of August, 1879, acquired a large and lucrative business in his profession aforesaid, and enjoyed the confidence of the best citizens and business men of the city of St. Louis, and, but for the grievances hereafter complained of would still have enjoyed the same.

2. That on or about the 8th day of August, 1879, and on divers other days, thereafter and before the bringing of this suit, the said defendants, in the city of St.

Louis, State of Missouri, published and caused to be published, shown and exhibited to divers persons, the following written words concerning the plaintiff, and of and concerning him in his capacity and profession of architect and superintendent, to-wit:

STATE OF MISSOURI, City of St. Louis.

Be it remembered that on this 6th day of August, 1879, personally appeared before me the undersigned a notary public within and for the city and state aforesaid, duly qualified for a term expiring January 8th, 1882, Anthony C. Dunleavy, who being by me duly sworn, on his oath deposes and says that heretofore, to-wit, on the 1st day of June, 1873, he was a member of the firm of John E. Oxley & Co., doing business in the city of St. Louis; that said firm on said date, made a proposition to do the galvanized iron, tin and copper work, on and about a certain public school building in course of erection, at Litchfield, Illinois, of which building one, J. B. Legg, of St. Louis, was supervising architect, and the deponent further says that said J. B. Legg promised John E. Oxley, the other member of said firm of John E. Oxley & Co., to give said firm the contract for said work on the building aforesaid, provided the sum of \$200 was paid to him, the said Legg, as commissions by the said firm of John E. Oxley & Co., the said John E. Oxley agreed to pay said amount to said Legg, and informed this deponent of said agreement, and the said sum of \$200 was afterwards paid by this deponent to said J. B. Legg according to said agreement, the last payment of \$100 being made by this deponent to J. B. Legg on the 9th day of June, 1873, and further this deponent says not. A. C. DUNLEAVY.

Sworn and subscribed before me this 6th day August, A. D. 1879.

> August Ahrens, Notary Public, City of St. Louis.

[L. S.]

- 3. That the defendants meant thereby to impress the public with the belief, that plaintiff was wholly unworthy of confidence and trust, in said capacity and profession of architect and superintendent, and said publication was so understood to imply, by those to whom the same was published and exhibited as aforesaid.
- 4. The said publication was false and malicious and by means thereof, plaintiff hath been and is greatly injured, prejudiced in his reputation aforesaid, and has, also, lost and been deprived of great gain and profit, which would otherwise have accrued to him in his said profession and business of architect and superintendent, to-wit, \$50,000.

Plaintiff says he is damaged in the sum of \$50,000, for which and costs, he demands judgment.

The answer is 1st, A general denial; 2nd, Justification; 3rd and 4th, That the publication was privileged. There was judgment for defendant.

The first point made by the respondents is that the petition does not state a cause of action. If this be true it is an end of the case and it will not be necessary to look further into it. As far back as 10 Mo. 648, in the case of Nelson v. Musgrave, Judge Napton quoted with approval the definition of libel from Judge Parsons in Commonwealth v. Clapp, 4 Mass. 168, which is as follows: "A malicious publication expressed either in printing or writing, or by signs or pictures, tending to either blacken the memory of the dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule." This definition was again approved by Bliss, J. in *Price* v. Whitely, 50 Mo. 439. In what manner does the affidavit of Dunleavy, set out in the petition, blacken the reputation of the plaintiff? It in substance alleges that plaintiff was supervising architect of a certain building and defendants paid him a commission to give defendants the contract for certain work thereon. Suppose that was true, how would it show that plaintiff was degraded or brought

into contempt or ridicule? The words to be actionable per se "must be such as if true would disqualify him or render him less fit properly to fulfill the duties incident to the special character he has assumed." Towns. Lib. & Sl., § 190—"Words to be actionable on this ground (as disparaging plaintiff in his calling) must touch him in his office, profession or trade." "They must impeach either his skill or knowledge, or his official or professional conduct." Odgers on Lib. & Sl., 65; Fitzgerald v. Redfield, 51 Barb. 484. Every false charge is not libelous. It must come within the definition. It must "blacken the memory of the dead or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule." In our opinion the affidavit in this case does neither and is therefore not libelous per se.

The words set out in the petition not being libelous per se and, therefore, not actionable, it becomes necessary by prefatory averments to set out the extrinsic matter which will render them so. McManus v. Jackson, 28 Mo. 58. In Bundy v. Hart, 46 Mo. 460, Bliss, J. says: "Indeed I have never heard the general principle doubted that where words are charged that are not actionable without a knowledge of some extrinsic fact it is necessary to set forth that fact by way of preliminary averment." If this is not done there is no cause of action shown. These necessary extrinsic facts being averred must be proven. "Innuendoes are used to so connect the words charged with the averments as to make the petition a logical and complete statement of the plaintiff's case." The same doctrine is announced in Curry v. Collins, 37 Mo. 324; Church v. Bridgman, 6 Mo. 190; Dyer v. Morris, 4 Mo. 214. Where the words are not actionable in themselves extrinsic facts and matters must be stated which shall render them so. In Caldwell v. Raymond, 2 Abb. Pr. Rep. 193, the libelous words were "Married, Joseph W. Caldwell to Miss Elizabeth Ehle late of New York" meaning a public prostitute by that name; thereby intending to charge that said plaintiff

had been guilty of marrying a prostitute. The court say, "that the publication on its face bore no injurious or defamatory meaning will not be disputed; and it is a well settled rule in pleading in actions of this character that where the words used by the defendant do not of themselves convey the meaning which the plaintiff would attribute to them and such meaning only results from some extrinsic matter or fact; such extrinsic matter or fact must be alleged in the complaint and proved on the trial." This may not be done by innuendo. It should be by preferatory averments. The rule is uniform that such averments must precede the innuendo. 2 Abb. Pr. supra. Town, on Lib. & Slander & 336; Christal v. Craig, ante, p. 367. The petition in this case has no averment showing the duties of a supervising architect, nor any allegation by which it is made to appear that those duties are in conflict with his taking commissions from a sub-contractor to aid him in obtaining a sub-contract on the building he is supervising. The nature of the alleged charge is not such that the court may presume that plaintiff's reputation is blackened or that he is thereby exposed "to public hatred, contempt or ridicule." "If this is a libel of plaintiff in his business it is so on account of some extrinsic fact," or some special obligation he was under to his employer. If so his petition must allege it. The universal rule of pleading is that if the words are not libelous per se, the petition must by preliminary averments show extrinsic facts from which the libel results. 2 Abb. Pr. supra; Pollard v. Lyon, 91 U. S. 225.

This petition does not contain the necessary averments of extrinsic matter and for these reasons the judgment of the court of appeals is affirmed. All concur.

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Jones, Appellant, v. Evans.

- Bill of Exceptions, Matter of. A bill of exceptions cannot, as a general rule, include matters which did not occur at the term of the court at which it was filed.
- Appeal: FINAL JUDGMENT. An order dissolving an attachment, is not a final judgment from which an appeal will lie.

Appeal from Gentry Circuit Court.—Hon. S. A. RICHARDSON, Judge.

AFFIRMED.

This was an appeal from a justice of the peace in Gentry county, to the circuit court. The amount of plaintiff's claim was \$85. Shortly after the filing of the justice's transcript in the circuit court, the plaintiff sued out an attachment process on the following grounds: 1st, That plaintiff had good cause to believe that defendant was about to remove his property and effects out of the State, with intent to defraud, hinder and delay his creditors. 2nd, That defendant was about to remove out of this State with intent to change his domicile. At the September term, 1879, of the circuit court, being the term to which the appeal was taken and triable, and the writ of attachment was returnable, the defendant filed a plea in abatement, which was tried at said term by the court, sitting as a jury, and the issues found thereon for the plaintiff.

Thereafter, at the same term of the court, and on September 9th, 1879, and before the cause was called for trial on the merits, defendant filed a set-off for \$83.50. Upon the same day a jury was empanneled to try the cause on its merits, and the same was begun, and pending said trial defendant withdrew his set-off, and also filed a motion for a new trial on the plea in abatement. After the conclusion of the trial on the merits, which resulted in a verdict and judgment for plaintiff in the sum of \$4.50, and on September 15th, 1879, the court sustained defendant's motion for

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a new trial on the plea in abatement. On the 1st day of March, 1880, plaintiff filed an unsuccessful motion to strike from the record defendant's plea in abatement, and afterward, at the September term, 1880, of the court, the cause was called for a re-trial on the plea in abatement, and plaintiff declining to take any part therein, the court dissolved the attachment proceeding and adjudged against plaintiff all the costs of the same. The plaintiff filed motions for a re-hearing and in arrest of judgment, to the judgment of the court in dissolving the attachment, and the same being overruled, he filed at said September term, 1880, of the court, his bill of exceptions and appealed to this court.

B. F. Lucas for appellant.

The court below should have refused to grant a new trial on the plea in abatement, but having granted it after all matters in abatement of the attachment had been waived by a plea to and a trial on the merits, the plea in abatement should have been stricken from the record, and it was error to dismiss the attachment and adjudge the costs thereof against plaintiff.

George W. Lewis and Vinton Pike for respondent.

The appeal is not prosecuted from the judgment on the merits, which was rendered at the September term, 1879, of the circuit court, and is not complained of, but from the order made at the September term, 1880, dissolving the attachment, because plaintiff refused to prosecute it. From such order no appeal lies to this court. Davis v. Perry, 46 Mo. 449; Jones v. Snodgrass, 54 Mo. 597.

Sherwood, J.—The bill of exceptions in this cause was filed at the September term, 1880, and included matters not only which had occurred at that term, but also those which had occurred in the cause at former terms, but

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as to which no exceptions had been taken or preserved. The office of a bill of exceptions is to preserve such matters of exception as occur during the term, to which exception has been taken. There is nothing in this record which takes it out of the operation of the general rule, so that only those matters of exception as occurred at the September term, 1880, can be reviewed by us in any event. But it is unnecessary that we look into the errors said to have happened at that term, for the reason that the judgment on the merits of the cause was rendered at the September term, 1879, and no appeal has been taken from that, both parties being therewith content.

The disposing of the attachment at the September term, 1880, was not a final judgment from which an appeal will lie. Davis v. Perry, 46 Mo. 449; Jones v. Snodgrass, 54 Mo. 597.

The issue made by the affidavit for attachment and the plea in abatemen', was a mere side issue, totally disconnected from the merits, and this especially so, since the attachment was merely ancillary to the original summons. To be effective, an appeal must operate on a final judgment, and not upon something less than a final judgment, A party cannot appeal his cause by piecemeal. Anderson v. Moberly, 46 Mo. 191. And especially when the final judgment, as here, is allowed to stand unaffected by the appeal. Ib.

Forasmuch as there is no final judgment, the cause should be stricken from the docket. All concur.

Walsh v. Morse, Executrix, Appellant.

- Practice: DEMURRER. Where there is any testimony to support a
 cause of action, it should be left to the determination of the jury,
 and a demurrer to the evidence should not be sustained.
- Instruction. It is not error to give an instruction when there is any evidence upon which to base it.
- 3. Fraudulent Representations: MISTAKE: SCIENTER. To support a personal action for fraudulent representations, it is not sufficient to show that the party making them did not know them to be true, and that they were, in fact, false; there must be fraud as distinguished from mere mistake. But, if the party state material facts as of his own knowledge, of which he knows nothing whatever, and not as matter of opinion, such willful statement in ignorance of the truth is the same as the statement of a known falsehood, and will constitute a scienter.

Appeal from Jackson Circuit Court.—Hon. S. H. Woodson, Judge.

REVERSED.

Gage, Ladd & Small for appellant.

Plaintiff's first instruction should not have been given, there being no evidence in the case that the notes of Case and Balis were taken as security. The second instruction is absolutely without evidence to support it. There is nothing in the record to show that Morse ever made any representations as to the pecuniary circumstances of Case or Balis. Plaintiff's third instruction is erroneous for several reasons. (1) There is no evidence that plaintiff had been deceived as to the solvency of Case and Balis. (2) There is no evidence that "Morse promised in writing that if the plaintiff would make efforts to collect from Case and Balis the notes, he, Morse, would pay the balance which could not be collected from them." Morse's liability had been voluntarily released, and no obligation existed upon which to found a promise to pay. Greenbaum v. Elliott, 60 Mo 25; Valentine v. Foster, 1 Met. (Mass.) 520; Hale v. Rice,

124 Mass. 292; Wharton on Cont., §§ 512, 513. (3) Even if Morse's promises to pay were made upon condition that "plaintiff would make efforts to collect," the performance of such condition would not constitute a valid consideration.

J. W. Jenkins for respondent.

The Case notes were received by respondent as security for the original indebtedness of Morse. And Morse promised repeatedly, both orally and in writing, to pay the balance of the money borrowed, which respondent should fail to collect from Case and Balis. The petition alleges, and the evidence shows, that representations were made by Morse, and relied upon by respondent, when the notes were received, which amounted to a warranty of their collectibility. Carter v. Black, 46 Mo. 384; Hainey v. James, 50 Mo. 316. And the liability of Morse for the breach of this warranty was a sufficient consideration for these promises. And the fact that respondent made efforts to collect the notes at Morse's request, also constitutes a sufficient consideration for the new promises.

Norton, J.—Plaintiff's petition alleged, substantially that he loaned the defendant's testator the sum of \$1,180, on the 12th day of December, 1873, for which the testator, Morse, executed his note to plaintiff, payable in one year; and to secure the payment of it, executed a mortgage on certain real estate. That afterwards, plaintiff becoming dissatisfied with the security, demanded other security. That the defendant in compliance with that demand, delivered to the plaintiff two promissory notes, executed by Theodore S. Case, and John R. Balis, for \$300 and \$500 respectively. That to induce plaintiff to accept the notes as security for the loan, the defendant, Morse, falsely and fraudulently represented to the plaintiff, that the notes were good; Case and Balis were men of large means, owning a large amount of property, out of which the

notes could be collected, and that they would be paid as soon as they became due. That plaintiff believing those statements, was thereby induced to surrender to the defendant his note, and accept the notes of Case and Balis for said loan. That the defendant's statements, as to the responsibility of Case and Balis, were false and fraudulent, and known by him to be such when he made them. That when the notes of Case and Balis became due, plaintiff brought suit on them, and obtained a judgment, and that at sundry times since that time, the defendant promised, verbally and in writing, to pay plaintiff whatever balance of the loan he should fail to collect from Case and Balis.

Defendant's answer was a general denial, and a special defense, admitting the fact of the loan of \$1,180, and the making of the note, and alleging that afterward, in May, 1874, the defendant paid to the plaintiff a certain amount of money, and at the same time delivered to him two promissory notes, on which the said Case and Balis were parties; and that the said money was paid, and said notes were delivered by the defendant to the plaintiff, and the same were received by the plaintiff, in full satisfaction and payment of defendant's indebtedness on account of said loan and note first mentioned, and that said indebtedness was thereby extinguished; and that at the same time the plaintiff surrendered to the defendant, as cancelled and fully paid, the said note for \$1,180. The reply was substantially a general denial. Before the trial the defendant. Morse, died, and the suit was revived in the name of his executrix.

On the trial there was a verdict and judgment for plaintiff, from which the defendant has appealed, and assigns for error the action of the trial court in giving and refusing instructions. At the close of the evidence the defendant asked the court to instruct the jury that under the pleadings and evidence plaintiff was not entitled to recover. This instruction was refused and the court among others gave the following for plaintiff:

1. If the jury believe from the evidence that the plaintiff accepted the notes of Case and Balis as security for the debt owing by L. V. Morse to him, then they will find for the plaintiff.

2. Even if the jury believe that the plaintiff received the Case and Balis notes in full payment of the balance due on the original indebtedness, yet if they further believe that the defendant represented to plaintiff that the said Case and Balis were wealthy men, owning a large amount of property over and above their indebtedness; that the said notes were perfectly good, and would certainly be paid when due; and if they find that plaintiff believed said statements of the defendant, and was thereby induced to accept said notes in payment of said indebtedness; and if the jury further believe that the said Case and Balis were at that time in failing circumstances, and the said notes were not and could not be collected of said Case and Balis then the jury will find for the plaintiff.

The first of the above instructions is objected to on the ground that there was no evidence on which to base it-The evidence shows that plaintiff, who was a section foreman on the Hannibal & St. Joseph railroad, loaned to Morse, who was the division superintendent on said road, the sum of \$1,180 for which he took his note secured by mortgage on real estate in Kansas City; that plaintiff became dissatisfied with his security and on the 29th day of May, 1874, received a letter from Morse in which he stated: "I have a chance to sell part of my city property, and would like to pay some on my note you hold and give you other security on property I have. Come down and bring with you the papers in the morning. will pay part cash and give you all the security you want for the balance." It appears that on the next day after this letter, and in pursuance of the request it contained, the parties met together, when plaintiff entered satisfaction of the mortgage; defendant paid him \$380 in cash and delivered to him two notes on Theo. S. Case; one for

\$554, dated January 26, 1874, due one year after date and one of same date for \$300, payable in six months and plaintiff surrendered the Morse note to him. It further appears that Case became a voluntary bankrupt in August, 1874; that the above notes were proved up by plaintiff against his estate which paid about six and one-fourth cents on the dollar. Reading the transaction which took place between the parties on the 30th of May, 1874, in the light of Morse's letter written on the 29th of May, 1874, in which he says his object was to pay part of his note and secure the balance, and in the light of the letters written by Morse subsequently to the transaction, in all of which he recognized his obligation to pay plaintiff and in one which he says, "when I took up my note and gave you his (Case's) notes and paid you the difference, I thought I was giving you the best kind of security," we are of the opinion that there was sufficient evidence to justify the court in submitting to the jury as it did in the first instruction, the question whether the Case notes were given and received only as security for, and not in payment of Morse's note. Whether the evidence was, or was not sufficient to rebut or overthrow the prima facie case of payment arising from the fact of the surrender of Morse's note to him by plaintiff, was for the jury to determine, and they might very well have found this issue for plaintiff on the letters of Morse read in evidence. For the reasons above given no error was committed either in giving plaintiff's first instruction, or in refusing to sustain defendant's demurrer to the evidence.

The objection to the second instruction is of a more serious nature. This instruction is based on the theory that although the Case notes may have been received in full payment of Morse's debt, yet if they were received on account of fraudulent representations made by Morse the verdict should be for plaintiff. The gist of an action grounded on fraudulent representations, is the fraud of defendant, and when it appears that a representation is made

which is known to be false at the time it is made, and the person to whom it is made relies upon it and is deceived to his injury an action lies against the party making it. The generally received doctrine now is that, in order to support a personal action for fraudulent representations, it is not sufficient to show that a party made statements which he did not know to be true and which were in fact false. There must be fraud as distinguished from mere mistake. It is not however always absolutely necessary that an actual falsehood should be uttered to render a party liable in an action for deceit; if he states material facts as of his own knowledge, and not as a mere matter of opinion, or a general assertion about a matter of which he has no knowledge whatever, this distinct willful statement, in ignorance of the truth, is the same as the statement of a known falsehood, and will constitute a scienter. Dulaney v. Rogers, 64 Mo. 201. The pleader in this case recognized the above doctrine in his petition by alleging that Morse knew the representations made by him were false, but the court in the instruction complained of ignored it, and authorized the jury to find for plaintiff without finding the truth of the matter averred in the petition as to Morse's knowledge of the falsity of his representations.

For this error the judgment will be reversed and the cause remanded in which all the judges concur.

KENNEY V. THE HANNIBAL & St. Joseph Railroad Company, Appellant.

- Practice: POSTPONEMENT: CONTINUANCE. Under the facts in this
 case, Held, the defendant was not entitled to either a postponement
 or continuance of the trial.
- Railroad: ENGINE: ESCAPE OF FIRE. When, in an action for damages against a railroad for the negligent escape of fire from its engine, the defendant has offered proof of care on its part, which evi-

dence is not contradicted, the court should not, as a matter of law, declare that plaintiff's prima facie case is rebutted.

3. —: —: A railroad is not liable for the escape of fire from its engine when it has provided one with the latest, best and most approved machinery, appliances and contrivances to prevent its escape, and a careful and competent engineer to operate the engine, one who used reasonable care to prevent such escape of the fire.

Appeal from Caldwell Circuit Court.—Hon. E. J. Broaddus, Judge.

AFFIRMED.

G. W. Easley for appellant.

Every prima facie case is founded on a presumption of law made by the court, and never on inference made by the jury as a deduction from other facts. Best on Ev., (Chamberlayne's Ed.) § 304; Stephen's Ev., (May's Ed.) 36; State v. Kelly, 73 Mo. 608; Garvin v. Williams, 44 Mo. 465; 50 Mo. 206. Admit that the escape of fire from the engine raises a presumption of law that it was negligently permitted to do so, yet it is for the court, and not the for jury. to determine the amount and character of evidence to overcome it, and when defendant's evidence is entirely uncontradicted, it is error for the court to submit the case to the jury. Spaulding v. Railroad Co., 33 Wis. 382. And when the verdict is made, against the uncontradicted evidence, it will be set aside. Reed v. Morse, 34 Wis. 315; Freemouth v. London, etc., R. R. Co., 10 C. B. (N. S.) 89. The defendant's first instruction should have been given. Spaulding v. Railroad Co., 33 Wis. 582; Reading, etc., R. R. Co. v. Latshaw, 2 A. & E. R. R. Cases 267. Where defendant's evidence to disprove the negligent escape of the fire is complete, and no fact appears apart from the mere escape of the fire from which negligence may be found, the loss is damnum absque injuria. Turnpike Co. v. Railroad Co., 54 Pa. St. 345; Railroad Co. v. Hendrickson, 80 Pa. St. 182; Flynn v. Rail-

road Co., 6 Am. Rep. 597, note. The continuance asked by the defendant, should have been granted. On the evidence, there is no pretense that the fire was not there before the engine passed. The question whether the failure of defendant's men to extinguish the fire creates a cause of action, is not in the record. That it does not create a cause of action, see Baltimore, etc., R. R. Co. v. Shipley, 39 Md. 251; Indianapolis, etc., R. R. Co. v. Paramore, 31 Ind. 143; Kenney v. Railroad Co., 70 Mo. 253.

Shanklin, Low & McDougal for respondent.

The court did not err in overruling defendant's application for a continuance. Defendant did not show the diligence the law requires. Wood v. Railroad Co., 58 Mo. 109; State v. Burns, 54 Mo. 274; Evans v. Pond, 30 Mo. 235; Scogin v. Hudopeth, 3 Mo. 123. The granting of continuances rests largely in the discretion of the trial court, and every intendment is made in favor of the ruling of that court. Leabo v. Goode, 67 Mo. 126, 132; King v. Pearce, 40 Mo. 222; Board of Regents v. Linscott, I Pac. Rep. 81; Riggs v. Fenton, 3 Mo. 28; State v. Worrell, 55 Mo. 256; Garret v. Railroad Co., 36 Iowa 121; Calhoun v. Crawford, 50 Mo. The court did not err in refusing the instruction requested by defendant, for it asked the court to find, as a matter of law, that the prima facie case made by plaintiff was rebutted. It was for the court, not the witnesses, to pass on the question of fact. Poeffers v. Railroad Co., 67 Mo. 716; Kenney v. Railroad Co., 70 Mo. 243; Coates v. Railroad Co., 61 Mo. 38. The first instruction asked by the defendant ignored the fact that the defendant's servants negligently permitted the fire to destroy plaintiff's property. Rolke v. Railroad Co., 26 Wis. 537; Westfall v. Erie R. R. Co., 5 Hun 75; Kenney v. Railroad Co., 63 Mo. 99. In Baltimore, etc., R. R. Co. v. Shipley, 39 Md. 251, the court only held that the company was not bound to keep men stationed along its track to put out the fire; that such a rule would be impracticable.

Henry, J.—This is the third time this case has been here on defendant's appeal. It is an action to recover damages for property of plaintiff destroyed by fire, which, plaintiff alleges, was set out by defendant's negligence. The pleadings are substantially the same as when the cause was here before, and the facts are not materially different. See 70 Mo. 253.

It appears from the transcript now before us, that at the June term, 1880, of the Caldwell circuit court, an order was made requiring defendant to supply the pleadings in the cause within thirty days of the close of that term, and continuing the case to the next term. It does not appear why the defendant was required to supply the pleadings, but it may be inferred that it was through its fault that they were missing. On the first day of the succeeding term, defendant having failed to supply the pleadings, plaintiff had leave to file his petition as a substitute for the original, and on the same day a judgment by default was rendered against defendant, which, on the fifth day of the term, on defendant's motion, was set aside, whereupon plaintiff withdrew the petition he had filed as a substitute, and defendant filed substitutes for the original pleadings, together with an amended answer, which differed from the original only in that it contained an allegation that by virtue of its charter it had the right to use locomotive engines, moved and worked by steam as a motive power to draw cars and trains, upon which, however, no issue was made by the replication. Defendant, thereupon, applied for a postponement of the trial for two days, which was refused, and then applied for a continuance of the cause to the next term, on account of the absence of material witnesses, and of what occurred in relation to the substitution of the pleadings, etc. This application was refused, and the propriety of that action of the court is the principal matter for consideration, if we adhere to our rulings in the cause when last here.

It was the duty of the defendant to supply the missing

record. It had from the June to the October term, 1880, to comply with the order. The affidavit shows no good reason why it was not done. The pleadings could have been supplied from the record of this court. In fact the defendant did supply them at the October term; must have known it could supply them, and should have used due diligence in getting ready for a trial of the cause at that term. The cause was pending and for trial at the October term, notwithstanding the lost pleadings had to be supplied. Defendant did not know, could not have known, of the substitute petition filed by plaintiff and of the judgment rendered upon it. That occurred on the first day of the term, and furnishes no earthly excuse to defendant for not getting ready for trial in the interim between the two terms. The court very properly refused both defendant's application for a postponement and for continuance.

The following are instructions asked by defendant, the first of which was refused and the second given:

1. It appearing from the uncontradicted evidence offered by the defendant that the engine which it is alleged communicated the fire to plaintiff's property was provided with the latest, best, and most approved machinery, appliances and contrivances, to prevent the escape of fire, and that a careful and competent engineer was operating said engine at the time, and that he used reasonable care in operating the same to prevent the escape of fire, therefore, the prima facie case relied upon by the plaintiff, is rebutted and the finding of the court must be for the defendant.

2. If the court, sitting as a jury, finds from the evidence, that the engine which it is alleged communicated the fire to plaintiff's property, was provided with the latest, best, and most approved machinery, appliances and contrivances to prevent the escape of fire, and that a careful and competent engineer was operating the engine at the time and that he used reasonable care in operating the same to' prevent the escape of fire therefrom, then the court must find for the defendant.

Counsel contends that when defendant offers proof of care on its part, and the evidence is uncontradicted, it is for the court to declare, as a matter of law, that plaintiff's prima facie case has been rebutted. Such is what the refused instruction asked. The occurrence of the fire is prima facie evidence of defendant's negligence, provided the evidence, whether circumstantial or direct, tends to prove that it escaped from the locomotive. The criticism on the distinction drawn in Kenney v. Railroad Co., 70 Mo. 250, between a prima facie case and a presumption of law, whether just or not, certainly throws but little light on the question arising on the refusal of defendant's first instruction. Evidence that a train of cars passed a given place and immediately after, fire was discovered on the track, not seen there before, does not raise a presumption of law that the fire escaped from the locomotive, and yet it is sufficient to warrant the submission of that issue to the jury, and if they find the fact that the fire escaped from the locomotive, the other fact that it was occasioned by the negligence of the defendant is included in that finding, and it devolves upon defendant to show care to prevent the escape of the fire. Whether it is called a presumption of law or a prima facie case is practically immaterial in this cause, but, speaking for myself, there is a distinction between a prima facie case which is made out by certain proved facts, and a presumption of law arising from a given state of facts. The instruction was properly refused and that given for defendant exactly declared the law applicable to this case. Kenney v. Railroad Co., 70 Mo. 250; Coates v. Railroad Co., 61 Mo. 40; Babcock v. C. & N. W. R. R. Co., 17 N. W. Rep. 909.

Defendant's counsel states in his brief that "on the evidence as it now stands there is no pretense that the fire was not there before the engine passed." Folsom, at the former trial, testified that "immediately after the passage of the train going east he saw fire spring up after it and on the right of way adjoining plaintiff's premises." His

testimony at the last trial was: "Immediately after the train passed fire sprang up near the track in two places about two hundred yards apart." I confess my inability to comprehend counsel's meaning. If there is any material variance between Folsom's testimony given at the last and that at the former trial with respect to the origin of the fire, I am utterly unable to see it.

The plaintiff asked no instructions; none were given except that at defendant's instance. The cause was tried by the court without a jury and the judgment which was for plaintiff is affirmed. All concur.

Mosman, Administrator, v. Bender, Appellant.

- Administrator: PROMISE MADE TO, AFTER DECEDENT'S DEATH. An
 administrator can sue in his representative capacity on a promise
 made to him after the death of the decedent, for the benefit of the
 estate.
- 2. ——: CONTRACTS BY. Where an administrator, acting for the best interests of the estate, releases a levy of execution on land which is subject to a lien of a prior judgment in favor of a third person for more than its value, in consideration of a promise to him to pay one-half of the judgment due the estate, such contract is not unlawful, and may be enforced against the promisor.
- Practice: Instructions. Instructions based on a defense not raised by the answer, or on facts stated therein not constituting a defense, are properly refused.

Appeal from Buchanan Circuit Court.—Hon. Wm. H. Sherman, Judge.

AFFIRMED.

Ramey & Brown for appellant.

The plaintiff cannot maintain this suit upon the con-

tract set out in the petition, in his representative capacity as administrator of Moss, and any defense can be made by defendant which could be made against Mosman, were he suing as an individual. Harney v. Dutcher, 15 Mo. 89, and cases there cited. The administrator cannot charge the estate with any indebtedness. Taylor v. Wyatt, 26 Conn. 184; Halloch v. Smith, 16 Reporter 778. The statute withholds from the administrator the authority to assign, release, or in any way to compound or meddle with any security belonging to the estate, except to collect the same, or to use it in payment of liabilities of the estate at its face value. Wag. Stat., p. 89, § 30; State v. Berning, 74 Mo. 89; Chandler v. Stevenson, 68 Mo. 450; Weil v. Jones, 70 Mo. 560; Stagg v. Green, 47 Mo. 500. The contract set up by defendant is against public policy. Porter v. Jones, 52 Mo. 399; Perry on Trusts. pp. 533, 534; Atlee v. Fink, 75 Mo. 100; Witmore v. Porter, 92 N. Y. 76. Plaintiff having agreed to recall the execution, and that no other one should issue, he violated his agreement in issuing a second one, and defendant was released.

J. D. Strong and H. K. White for respondent.

Mosman had the power to make the agreement sued upon. Hand v. Motter, 73 Mo. 457; State v. Meagher, 44 Mo. 356; Foster v. Davis, 46 Mo. 268; Julian v. Abbott, 73 Mo. 580; Burkendorf v. Vincenz, 52 Mo. 441; Fudge v. Durn, 52 Mo. 264; Gamble v. Gibson, 59 Mo. 585; Merritt v. Merritt, 62 Mo. 150; Judge v. Booge, 47 Mo. 550. The estate was the real party in interest, and entitled to sue on the contract. R. S., § 3462; Rogers v. Gosnell, 58 Mo. 589; Faulkner v. Faulkner, 73 Mo. 327. The new matter in the answer stated no defense to plaintiff's action. Faulkner v. Faulkner, 73 Mo. 327; Smith v. Gregory, 75 Mo. 421. The defendant's instructions were rightly refused. Kitchen v. Railroad Co., 67 Mo. 224; Buel v. Buckingham, 16 Iowa 284; Leabo v. Goode, 67 Mo. 126.

Ewing, C.—The petition in this cause alleges that Geo. B. Moss obtained judgment against Willis M. Sherwood, Lyman W. Dinsmore and James T. Beach for \$571, and died; that afterwards the plaintiff, Mosman, was appointed his administrator; that said judgment was a lien upon the real estate of the said Willis M. Sherwood and James T. Beach, defendants therein, and an execution was issued and levied on certain lands belonging to them, and the same were advertised for sale to satisfy said execution. That at said time the defendant and one James Hunter were about to become interested in the lands owned by Willis M. Sherwood, which were advertised for sale as aforesaid, and on the 14th day of January, 1874, an agreement was entered into by defendant, on behalf of himself and the said Hunter, and this plaintiff, as administrator of the estate of the said George B. Moss, deceased, on behalf of said estate, whereby it was stipulated and agreed that this plaintiff should as such administrator, recall said execution and not permit or allow a sale to be made under the levy thereof, of the lands of the said Sherwood, but return the same, and that the defendant and the said Hunter would purchase said lands so bound by the lien of said judgment, owned by the said Sherwood, and would pay to the estate of the said George B. Moss, deceased, the onehalf of the sum due to said estate upon said judgment. That in pursuance of said agreement this plaintiff, as such administrator, stopped the sale of said lands, under said execution and advertisement, and said lands were not sold thereunder, and said execution was by his order returned; that in pursuance of said agreement and understanding, the defendant and said Hunter purchased said land and caused it to be conveyed to the defendant, paying therefor not more than one-seventh of its market value, and the defendant, on behalf of himself and said Hunter, took the possession, control and management thereof, negotiated a sale of said lands and sold and conveyed the same, or

caused the same to be sold and conveyed, to one Colt, and defendant received the sum of \$3,500, the proceeds of said sale, and set apart out of said funds so in his hands, with the consent of the said Hunter, the sum of \$300 to pay the said one-half of the amount due on said judgment to said estate, and by and with the consent of said Hunter and of this plaintiff, who as an individual had become interested in the proceeds of the sale of said land, retained in his hands said sum of \$300, in pursuance of said original agreement, as money due and owing to the estate of Geo. B. Moss, deceased, as the one-half of the sum due it upon said judgment, and promised and agreed with them to pay the same to said estate, and in consideration thereof was permitted to and did take credit for said amount in his said accounts with said Hunter and this plaintiff. That this plaintiff, relying on the agreement made by the defendant as aforesaid, to pay to said estate the one-half of the sum due to it on said judgment, refused to sell said land under said execution, recalled the same and returned it, and permitted the lien of said judgment to expire, and thereupon defendant refused as aforesaid to pay said amount.

Defendant, answering, says that about the month of March, 1873, the said plaintiff and his then law partner, James Hunter, and William M. Albin and this defendant were interested in certain lands which had formerly belonged to one Willis M. Sherwood, and on which it was claimed that a judgment in favor of Geo. B. Moss, against said Sherwood was a lien. That an execution had been issued on said judgment, and had been levied on said land; that it was agreed between said parties, that is to say, the said plaintiff, this defendant, the said Hunter, and the said Albin, that they would jointly, out of their interests in said lands, or of the proceeds of the sale thereof, pay on account of said judgment in favor of said Moss one-half thereof, if plaintiff as administrator of the estate of the said Moss would cause the execution issued on said judgment, to be returned without any sale of

said property being made, and would not cause another execution to be issued on said judgment. That at the time of the rendition of the said judgment in favor of Moss against Sherwood, the lands of Sherwood were subject to a prior lien, to the extent of about \$4,000, which was and is a greater sum than the value of all the lands the said Sherwood then had, or at any time since has had, here or elsewhere; and that this defendant acquired the title of said Sherwood to said lands of Sherwood, under and by virtue of said prior lien thereon. That afterward said land was sold by defendant for the benefit of defendant, plaintiff, Albin and Hunter. That a part of the amount for which said land was sold was by the agreement of said parties to pay various liabilities incurred by them on account of said land, and which was supposed at the time to be sufficiently large to pay all such liabilities and all other liabilities that they might incur to perfect their title to said land. That after the sale, a division of the proceeds, less the amount set apart to pay liabilities, was made, and \$556.54 paid to plaintiff as his share of the sale. That the amount of money set apart for the payment of liabilities, incurred on account of said land as aforesaid, has been paid out on account of such liabilities, without any part thereof being applicable to the payment of the Moss judgment. That plaintiff has persistently refused to contribute the money or any part thereof necessary to pay one-half of the Moss judgment. That Hunter had not contributed his share; and that Albin and defendant had not recovered their share of the sale proceeds. That plaintiff, afterward in violation of his agreement, sued out execution on said judgment and sold said land.

The evidence tended to prove the allegations for both plaintiff and defendant; but the defendant objected to all the evidence offered by the plaintiff upon the ground that the petition did not state a cause of action, which is the overruling question in the case, and which was also raised by numerous instructions.

I. The appellant insists that the respondent cannot maintain this suit in his representative capacity, because it is a promise made to him since the death of Moss.

It has been frequently held that a promise made for the benefit of a third person may be sued upon by such person. Schuster v. K. C. St. Jo & C. B. R'y Co., 60 Mo. 290. A contract made with a party, for the benefit of another, may be sued on by either. Rogers v. Gosnell, 51 Mo. 466. Here the promise was made to Mosman "to pay to the estate of the said Geo. B. Moss deceased, the one-half of the sum due to said estate upon said judgment." The estate was the real party in interest, and the suit was brought by plaintiff as the administrator; or, it might have been maintained in the name of Mosman, the trustee of an express trust. R. S., § 3463; Bliss Code Plead., § 53; Knox v. Bigelow, 15 Wis. 415. This is not in conflict with Harney v. Dutcher, 15 Mo. 90. There the question was, could an administrator de bonis non, sue, by virtue of his office, on a note made payable to the preceding administrator. Lessing v. Vertrees, 32 Mo. 431.

II. Appellant insists that the contract is void; that under the statute the administrator had no authority to release the lien of the estate, or to compound the Moss judgment in any way, without authority of the probate court, and that, as the contract is unlawful, the wrong-doer cannot enforce it.

There is no doubt but that administrators and executors derive their authority from the statutes, and orders of the probate courts. Chandler v. Stevenson, 68 Mo. 450; Weil v. Jones, 70 Mo. 560. And, if he depart from this rule, it must be in the exercise of such sound discretion as will bear the strictest scrutiny and show the best faith. Cases must arise in the administration of estates of deceased persons, which absolutely require the exercise of a sound discretion on the part of the administrator, who acts in the capacity of a trustee. In Gamble v. Gibson, 59 Mo. 596, it is said, "exigencies may arise in which trustees are bound

to assume responsibilities in order to protect the trust fund, and although they are held to great strictness in its management, they will not be dealt harshly with when it appears they have acted in good faith." In Julian v. Abbot, 73 Mo. 580, it is held that "an administrator is bound to use all the care, diligence and caution in the management, collection and protection of the assets of the estate, that a prudent and careful business man would use, in the care and management of his own business, and, if necessary, may employ an agent to assist him in the collection of the assets of the estate; but if loss occurs by reason of the financial failure of the agent, without any collusion, negligence or inattention on his part, he is not liable for the loss." Merrit v. Merrit, 62 Mo. 150.

In the case under consideration, the defendant's answer develops the fact that the land of Sherwood was subject to the lien of a prior judgment for more than its value. This being true, it surely was not against public policy that the administrator should agree to relinquish his lien upon the promise, to pay one-half of that judgment lien. If the allegation of the defendant be true in this regard, the release of the junior judgment lien was a mere formality that could do the estate of Moss no harm whatever, and would be the means of securing payment of one-half the debt. Here was no "attendant fraud or unfair dealing or abuse of the confidence reposed in the trustee." The pleadings and evidence on the contrary show that the administrator was acting for the best interests of his decedent's estate. Benkendorf v. Vincenz, 52 Mo. 441; Fudge v. Durn, 51 Mo. 264; Judge v. Booge, 47 Mo. 550; Chesley v. Chesley, 49 Mo. 540.

III. The third point made by the defendant is: That the plaintiff not only agreed to recall the execution issued on the Moss judgment, but also agreed that no other execution should issue; that the subsequent issuing of an execution and sale of the land thereunder was a violation of the agreement and released defendant.

If this proposition constituted a valid defense, it should

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have been so pleaded that an issue could be joined and submitted to the jury. The answer itself shows that the issue of a second execution and sale thereunder, would work no material damage to the defendant. It shows that the judgment lien had expired; that defendant had bought the land under the prior lien; that he had sold it to an innocent purchaser for \$3,500, and divided the proceeds. The answer alleged no damage to defendant by virtue of the second execution, and hence there was no error in refusing an instruction upon that point.

Other questions were learnedly discussed by counsel, but those passed upon must be decisive of the case, and it is useless to consider bare questions of law which cannot affect the conclusion reached. The questions presented by the instructions have been disposed of as far as necessary.

Indeed upon the pleadings in the case we are of opinion the plaintiff should have judgment, and the action of the court below is affirmed. All concur.

SNITJER V. DOWNING, Appellant.

Jurisdiction: EJECTMENT: VENUE. Where an appeal in an ejectment suit is taken from one county, the land in controversy being situated in another, and the record fails to show how the circuit court of such former county acquired jurisdiction, the judgment will be reversed. The circuit court of the former county could only acquire jurisdiction by a change of venue ordered by the circuit court of the latter.

Appeal from Schuyler Circuit Court.—Hon. Andrew Ellison, Judge.

REVERSED.

Smoot & Pettingill for appellant.

The demurrer to the second count of defendant's an-

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swer, was improperly sustained by the court. The facts set up in said count were sufficient to authorize the interference of a court of equity. A trustee should adopt all reasonable means to render the sale beneficial to the debtor. Stoffel v. Schroder, 62 Mo, 147; Goode v. Comfort, 39 Mo. 313. Sale made by trustee being a harsh mode of disposing of the equity of redemption, should be watched by the courts with a jealous eye, and should not be sustained unless conducted in all fairness. See Brown v. Rensler, 15 Ill. 507; Goode v. Comfort, 39 Mo. 313; Howard v. Ames, 3 Mete. 311; Stoffel v. Schroder, 62 Mo. 147. It is competent for the defendant to set up an equitable defense to an action of ejectment. See Harrison v. Thomas, 58 Mo. 468; Baker v. Nall, 59 Mo. 265; Everers v. Snider, 64 Mo. 516; Sims v. Gray, 66 Mo. 613. The finding of the court was against the evidence, and for the wrong party.

Highee & Shelton for respondent.

Plaintiff recovered judgment against the makers of the note at the July term of the Schuyler circuit court, 1880, which was affirmed by this court January 31st, 1881. The same defense was made to that action as is now made in defendant's first count. This issue is, therefore, res adju-The plaintiff had a right to purchase the note. The words "guardian," etc., in the note, are merely descrip-Thornton v. Rankin, 19 Mo. 193; Daniels Neg. Inst., Plaintiff's title cannot be impeached collaterally. Until set aside by a direct proceeding for that purpose, the trustee's sale must stand. Haeussler v. Mo. Glass Co., 52 Mo. 452. Matters dehors the record cannot be inquired into collaterally in an action of ejectment. Hardin v. Mc Canse, 53 Mo. 255; Ellis v. Jones, 51 Mo. 180. Irregularities cannot be taken advantage of collaterally, even when the plaintiff is the purchaser. Pray v. Marshall, 75 Mo. 329. Defendant's answer contains no equity. Tetherow v. Chambers, 74 Mo. 184; Stoffel v. Schroeder, 62 Mo. 147, and Goode

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v. Comfort, 39 Mo. 313, cited by appellant, were direct proceedings to set aside trustees' sales.

Philips, C.—Respondent sued appellant in ejectment to recover a lot or parcel of land near Main street, in the town of Memphis, Scotland county, as it appears from the petition and the judgment. The cause was tried in the circuit court of Schuyler county, and judgment therein was rendered in favor of plaintiff, and the defendant has brought

the case here on appeal.

How the circuit court of Schuyler county acquired jurisdiction over the subject matter of litigation, to-wit, the right of possession and title to land situate in Scotland county, does not appear from the record. The clerk in certifying the transcript, in what he is pleased to designate the "Preamble," recites: "Be it remembered that heretofore, to-wit, March 17th, 1879, a petition was filed in the above entitled cause in the office of the clerk of the circuit court of Scotland county, Missouri." But no transcript or record entry legally attesting that fact is given, but merely the naked recital of the clerk of the Scotland county circuit court. If the petition was filed in Scotland county, where it alone could have been properly filed, the only mode by which the cause could have been transferred to Schuyler county, so as to give the latter court jurisdiction, was by change of venue ordered by the Scotland circuit court. Henderson v. Henderson, 55 Mo. 544. This case is on all-fours with that of Bray v. Marshall, 66 Mo. 122, the principle of which is affirmed in Fields v. Maloney, 78 Mo. 172.

As the defect of want of jurisdiction is apparent of record, the judgment of the circuit court is reversed and the cause remanded to the circuit court of Schuyler county to be disposed of according to law.

Ewing, C., concurs; Martin, C., and Sherwood, J., absent.

THE STATE V. DENNIS, Appellant.

- Indictment, Sufficiency of. An indictment authorized by Revised Statutes 1879, section 1861, Held, sufficient, following The State v. Fancher, 71 Mo. 460.
- False Pretenses: SUFFICIENCY OF EVIDENCE: VENUE. Defendant bought twenty-four mules of G., in Randolph county, for \$140 each, giving G. in payment for them \$80 in cash, and a draft on M. & J., of St. Louis, for the balance of \$3,248, representing to G. that he had the money in the hands of M. & J. with which to pay the draft, when in fact he had in their hands but \$69.60, less \$32, the freight on the mules. Defendant ordered the car for the shipment of the mules, directed them to be shipped in G.'s name, and at his request they were so shipped, and after the payment of the \$80 and giving the draft for the balance, defendant procured G. to sign a statement that he had bought the mules, and that they were his. Defendant went to St. Louis on the train with the mules, and on the day they arrived he sold them and ran off with the money. He exhibited to the purchaser and to the consignee the statement he had procured G. to sign, showing he had bought the mules, and that they were his. Held, that when defendant paid G. for the mules by giving him \$80 in cash, and a draft for the balance, he became invested with the property in them, and also their possession, that he was guilty of . obtaining property by means of false representations, and that the "enue of the offense was properly laid in Randolph county.

Appeal from Moberly Court of Common Fleas.—Hon. G. H. Burckhartt, Judge.

AFFIRMED.

T. B. Kimbrough and S. C. Major for appellant.

The court erred in overruling the demurrer and the motion in arrest, it being admitted that the possession of the mules was at no time in defendant in Randolph county. The grand jury had no right to inquire into the offense charged. Const. of Mo., art. 2, § 22; R. S. 1879, §§ 1689, 1968; State v. Burns, 48 Mo. 438; State v. Meyer, 64 Mo. 190; 15 Ind. 378; Ex parte Slater, 72 Mo. 102; 1 Bishop Crim. Proc., §§ 49, 50; 4 Bl. Com., 303; 1 Stark. Crim. Plead., (2 Ed.) 1. The false pretenses must be relied on

and confided in as true, and be the inducement upon which the prosecutor parted with his property. And Grant never having parted with his property in Randolph county, defendant is guilty of no offense punishable within the jurisdiction of the Moberly court of common pleas. R. S., §§ 1335, 1561; State v. Evers, 49 Mo. 542; State v. Bonnell, 46 Mo. 395; State v. Green, 7 Wis. 676; State v. Mager, 11 Ind. 154; Comm. v. Drew, 19 Pick. 179; Ranney v. People, 22 N. Y. 413; Blanchard v. People, 90 N. Y. 314; 1 Bishop Crim. Law, §§ 204, 206; People v. Adams, 3 Denio 190.

D. H. McIntyre, Attorney General, for the State.

The evidence offered by the State brought the defendant within the statute. R. S. 1879, § 1561; Kelley's Crim. Law, § 640; Desty's Crim. Law, § 149a; State v. Evers, 49 Mo. 542; Comm. v. Alsop, 1 Brewster (Pa.) 328; Bowler v. State, 41 Miss. 570. The intent may be inferred from the guilty act, and need not be directly proved. People v. Herrick, 13 Wend. 87; 2 Wharton Crim. Law, (8 Ed.) § 1184; 2 Bishop Crim. Law, (7 Ed.) § 471; Comm. v. Coe, 115 Mass. 501; State v. Tessier, 32 La. An. 1227; People v. Hayes, 11 Wend. 557. The indictment is in the form authorized by statute, and has been repeatedly sustained by this court. State v. Fancher, 71 Mo. 460; State v. Connelly, 73 Mo. 235; State v. Norton, 76 Mo. 180.

Norton, J.—The defendant was tried at the October adjourned term, 1883, of the Moberly court of common pleas, convicted and sentenced to imprisonment in the penitentiary for four years. The trial was had under an indictment, the formal parts of which being omitted, is as follows:

"That John B. Dennis, late of the county of Randolph aforesaid, on the 12th day of January, 1883, at Prairie township, in Randolph county and state aforesaid, within the jurisdiction of said Moberly court of common pleas, did, with intent to cheat and defraud, unlawfully and

feloniously obtain from Thomas J. Grant his property, towit: twenty-four head of mules, by means and by use of false and fraudulent representations, and statements, and fraud, and deception and false pretense, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state."

This indictment is based on section 1561, R. S., and under the ruling of this court in the cases of State v. Fancher, 71 Mo. 460, State v. Connelly, 73 Mo. 235 and State v.

Norton, 76 Mo. 180 it must be held to be sufficient.

It is however insisted by counsel, first, that the evidence does not show that defendant committed any offense, and second, that if the offense charged in the indictment was committed, it was not committed in Randolph county but in the city of St. Louis, and that therefore the trial court erred in overruling defendant's demurrer to the evidence, and in submitting the case to the jury. If either one of these points is well taken the judgment must be reversed, and to determine whether they are or not, a review of the evidence is necessary.

It appears from the evidence that Thomas J. Grant, who resided in Randolph county, was the owner of twenty-four head of mules, which he had on his farm in said county; that defendant came to his house on the 12th day of January, 1883, and proposed to buy them; that they could not agree that day; that negotiations for the purchase of them were resumed the next day by the defendant when a sale was made concerning which Grant testified as follows:

"We finally agreed upon \$140 per head, less the freight which was \$32, making the whole amount for the mules to be \$3,360, which reduced by the freight \$32, and then less the amount paid in cash made it \$3,248. He, Dennis, said I want you to bear in mind that my own good money is to pay for these mules. This was the fourth car load of mules I had sold Dennis. He said I need not fear that I would get my money, and that he had the money on deposit in St. Louis with which to pay the draft." This wit-

ness further testified that "while the mules were being loaded in the cars, the defendant cried out at the top of his voice that he was nearly killed, that he had been struck on the head and he guessed it would end him; he was carried in the depot where his head was examined and there was no sign of a blow, no knot, no blood nor cut, nor any indication that he had been struck, and though he continued to complain, and said he did not think he would ever get well, yet when we proposed to send for a doctor he said. oh no, I will soon be all right,' and as the train was then about due, and the mules were not paid for, I asked him for the money, and he continued his groans, ran his hands in his pockets, handed me his pocket-book, told me to take out of it as part payment on the mules, all there was in it, leaving him enough to get to St. Louis. I found in his pocket near \$100, and I took out and kept \$80, and gave him the balance. He said 'just leave me enough to get home.' He took the train and started for St. Louis. The twenty-four head of mules were shipped in my name to McPike & Johnson, in St. Louis, as consignee. Dennis gave me a draft on himself addressed to McPike & Johnson, in St. Louis, Missouri, which read as follows:

\$3,248. Renick, January 13th, 1883.

McPike & Johnson pay to the order of T. J. Grant \$3,248, and charge the same to account of John B. Dennis, St. Louis.

(Signed) J. B. Dennis.

Witness further testified that he inclosed this draft to McPike & Johnson in a letter, which is as follows:

RENICK STATION, January 13th, 1883,

McPike & Johnson, St. Louis, Mo.:

I inclose draft on you for \$3,248, which you will please honor, by sending check to me on Randolph Bank at Moberly, Missouri. The draft is for twenty-four mules I sold to John B. Dennis.

(Signed) T. J. GRANT.

He further stated that McPike & Johnson telegraphed him that Dennis had sold the mules. Witness also testified that at the time the sale was made to Dennis, Dennis asked him to give him a statement showing what he paid for the mules, and that at his instance and dictation, he signed the following paper:

RENICK, January 12th, 1883.

McPike & Johnson:

Gents: I sold to-day to Mr. John B. Dennis, twenty-four head of mules for \$140 per head, which makes \$3,360.

(Signed) T. J. Grant.

Dennis said his only object in getting this statement was to show it to any one to whom he would sell, that he was to give \$140 per head, and for no other purpose. Witness stated that he consigned the mules as he did because Dennis requested him to do so, and to protect himself.

Mr. Powell testified as follows: "I was depot agent on the 12th and 13th of January, 1883. Dennis asked me to get a car, and said 'I think I will buy Grant's mules, but don't you tell him, for if you do Grant may raise the price on me;' that he, Powell, wrote the draft and Dennis signed it, and said that the money was with McPike & Johnson to pay the draft with, and the mules were shipped by Grant in his name to McPike & Johnson. Did not know at whose instance the consignment was made; that he drew the draft at the instance and direction of Dennis, and he directed how the mules should be consigned."

Johnson, of the firm of McPike & Johnson, testified that he saw the Dennis draft in a letter written by Grant to McPike & Johnson, on Sunday, January 14th, 1883. Saw Dennis on Sunday in the yard, and Meyer was with him; they traded after twelve o'clock. Dennis showed me and to Meyer, in my presence, the statement from Grant, to the effect, that he, Dennis, had bought the mules and paid for them, and that they were his. Meyer bought the mules and claimed to have paid Dennis for them. This witness

further stated that Dennis never had money enough deposited with McPike & Johnson to pay for the mules.

The book-keeper of McPike & Johnson testified that on the 13th of January, 1883, Dennis only had a balance to his credit of \$69.60, less the freight; that he saw the draft on the 14th of January, 1883. A receipt given by Dennis to Meyer for \$3,440, in full payment for the mules, was also read in evidence.

Mr. George testified that he heard Dennis tell Grant that he had the money at McPike & Johnson's to pay for the mules.

Richard Grant testified that he heard Dennis say he had the money on deposit in St. Louis to meet the draft he gave Jeff. for the mules.

We think the evidence above detailed brings the case within that class of crimes mentioned in section 1561, Revised Statutes. It tends to show, if it does not conclusively establish the fact, that defendant, by means of the false representation that he had on deposit with McPike & Johnson, in St. Louis upon whom the draft was drawn, money sufficient to pay it, deprived Grant of his property, and obtained it for himself. The representation made by Dennis that he had the money in the hands of McPike & Johnson to pay the draft, related to a fact having a present existence, and brings the case within the principle laid down in the case of State v. Evers, 49 Mo. 542, that the essence of the crime of obtaining money or property by false pretenses is, that the false pretense should be of a past event, or of a fact having a present existence.

It is, however, earnestly insisted by counsel, that if any offense was committed, the evidence shows that it was committed in the city of St. Louis, and not in Randolph county, and that the demurrer to the evidence should have been sustained, on the ground that the Moberly court of common pleas of Randolph county had no jurisdiction. If the premises assumed be well founded, the legal conclusion drawn from it is undoubtedly correct. But we are of the

opinion that the evidence shows the offense to have been committed in the county of Randolph. The indictment charges that the defendant obtained in said county the property of Grant, twenty-four mules, by means of false and fraudulent representations, etc.

The evidence shows that on the 13th day of January, 1883, defendant bought of Grant said mules at \$140 per head; that the car for their shipment was ordered by defendant; that in payment for the mules he gave Grant \$80 in cash, and a draft on McPike & Johnson, of St. Louis, for the balance, amounting to \$3,248, representing at the time he gave the draft that he had the money in the hands of McPike & Johnson to pay it; that this representation was false, defendant only having to his credit at the time it was made with McPike & Johnson, the sum of \$69.60, less freight, amounting to \$32; that he directed the shipment of the mules, and they were shipped in the name of Grant at defendant's request; that defendant, after the \$80 in cash was paid, and after he had given his draft for the balance of the purchase price, procured a writing to be signed by Grant, evidencing the fact that he had bought the mules, and that they were his; that defendant went to St. Louis on the same train that carried the mules, where he arrived on Sunday, the 14th of January, sold the mules, got the money for them, and ran off with it, exhibiting to the buyer and to Johnson the paper which he had procured Grant to sign, showing that he had bought the property, and that it was his. We think it clear that when defendant paid Grant for the mules by giving him \$80 in cash, and his draft in payment for the balance on McPike & Johnson, that he was not only invested with the property in the mules, but also with the possession, if it be true that the mules were shipped according to his direction in the name of Grant. If the mere fact that Grant shipped the mules in his name, gave Grant the possession, then his possession was the possession of defendant, if he was only the agent of defendant. In respect to shipping them in his own name, and that he

was such agent, is shown by the fact that defendant ordered the car for their shipment, was to pay the freight, directed the shipment, requested Grant to ship them in his own name, and the further fact that he procured Grant to give him a paper for exhibition to McPike & Johnson, (for it was directed to them,) showing a complete right, both to the property in the mules and the possession of them. Everything that was done whereby the property in the mules passed out of Grant into Dennis, was done in Randolph county, and the false representations by which this result was accomplished, were made there.

Defendant, so far as the evidence shows, made no false representation in St. Louis county to get possession of the property; he only exhibited to Meyer, who bought the mules, and to Johnson, a genuine paper which he had procured Grant to sign in Randolph county, evidencing the fact that the mules were not Grant's, though shipped in

Grant's name, but were his.

The questions as to the fraudulent intent of defendant in making false representations to Grant, as well as whether Grant was influenced by them to part with his property, were submitted to the jury in unexceptionable instructions, and the evidence tended strongly to support their finding on the questions.

The fact that Grant said the mules were shipped as they were, at defendant's request, and for his own protection, could not affect the merits of the case, if the jury believed from all the evidence that the defendant made the false representation as to his having the money to pay for them for the purpose of getting Grant's mules, and that Grant, relying on such representations, let him have them.

We perceive nothing in the record that would justify an interference with the judgment, and it is hereby affirmed. All concur, except Judge Henry, who dissents.

WILLIAMS V. THE HANNIBAL & St. JOSEPH RAILROAD COM-PANY, Appellant.

- 1. Pleading: RAILROAD: KILLING STOCK. A statement, in an action against a railroad, for double damages for killing a colt, occasioned by its neglect to fence as required by law, which alleges that the killing occurred at a point where the road passes along, through and adjoining inclosed fields, negatives the idea that the colt might have been killed in an incorporated town.
- 2. Railroad; KILLING STOCK: INSTRUCTIONS. In such action, an instruction was unobjectionable which told the jury that they should find for defendant, if they believed that the fence, where the colt got over the same, was a post and plank one of the height of four and one-half feet, and that the same was broken down by plaintiff's colt or by some other horses, or by mules, and that thereby and at the time the fence was broken, the colt got on the track of the railroad and was killed.
- Jurisdiction. The jurisdiction as to the amount in such action, would be governed by the sum claimed as single damages, and not by the amount after the damages are doubled.

Appeal from Linn Circuit Court.—Hon. G. D. Burgess, Judge.

AFFIRMED.

Geo. W. Easley for appellant.

The statement does not set out facts sufficient to constitute a cause of action, and will not support the judgment. Rowland v. Railroad Co., 73 Mo. 619; Schulte v. Railroad Co., 76 Mo. 320. The modification by the court of defendant's third instruction, was wrong. Clardy v. Railroad Co., 73 Mo. 576. The justice had no jurisdiction.

Torrence & Lithgow for respondent.

EWING, C.—This suit was commenced before a justice of the peace upon the following statement:

Plaintiff states that at the time of the grievances herein complained of, defendant was and still is a railroad corpora-

tion, duly created and existing under and by virtue of the laws of the State of Missouri, operating and running said railroad, together with its engines and cars through Jefferson township, Linn county, Missouri. That on or about the 11th day of October, 1880, he was the owner of one Norman colt, of the value of \$100, which said colt strayed upon the track of defendant in Jefferson township, Linn county, Missouri, at a point where said railroad passes along, through and adjoining inclosed or cultivated fields, or unin-· closed lands, and was killed on said date by the engine and cars of defendant in said township. That said colt was killed by reason of the failure of defendant to erect and maintain good and sufficient fences at said point as aforesaid. Plaintiff further states that Jefferson township is an adjoining township to Brookfield township, Linn county, Missouri, and that by virtue of section 809 of the Revised Statutes of the State of Missouri, he is entitled to recover double the value of said colt, being the sum of \$200, for which he asks judgment.

Judgment by default before the justice, and appeal to the circuit court, when the defendant appeared and moved to dismiss the suit, because the justice "had no jurisdiction of the subject matter of the suit." This motion was overruled, and, upon trial, the plaintiff offered evidence tending to prove that the colt got on the track because of a defect in the fence at a place where by reason of the top rail being off, had only been about three feet high all summer.

The defendant offered evidence tending to prove that the fence was in good repair, of sufficient height, and was broken down by plaintiff's and other animals on the night of the accident.

The court gave three instruction for the plaintiff, which, although objected to at the time, yet appellant makes no point concerning them in its brief, and as they are unobjectionable, they will not be further noticed here. Then

the court gave two instructions for the defendant, as follows:

1. Unless plaintiff has shown by the preponderance of the evidence in his favor, and to the satisfaction of the jury, that the colt in question got upon the track of the defendant's railroad by crossing over the fence inclosing the railroad track, and that the said fence, where said colt got over the fence, had been suffered by the defendant to be and remain out of repair, and insufficient to prevent ordinary cattle and horses from getting over the same, then the plaintiff is not entitled to recover in this action, and the verdict must be for the defendant.

2. If the jury shall believe from the evidence that the fence where plaintiff's colt got over the same, and thereby went upon the track of defendant's railroad was, prior and up to the time when said colt got over said fence, a post and plank fence at least four and one-half feet high, then the plaintiff cannot recover in this action.

The court refused the third as asked, but gave it after inserting therein the words, "and at the time said fence was broken," after the word "thereby," making it read as follows:

3. If the jury should believe from the evidence that the defendant's fence where plaintiff's colt got over the same, was a post and plank fence of the height of four and one-half feet and that the same was broken down by the plaintiff's colt or by some other horses or by mules, and that thereby (and at the time said fence was broken) said colt got upon the track of the railroad and was killed by a train the verdict should be for defendant.

I. The first point made by the appellant is as to the sufficiency of the statement, and he cites Rowland v. Railroad Co., 73 Mo. 619 and Schulte v. Railroad Co., 76 Mo. 324, as authority sustaining his position. In those cases it was held that in suits under section 43, Wagner's Statutes, 310, the statement must show by direct averment, or necessary implication that the killing did not occur within

the limits of some incorporated town. In the case under consideration the statement alleges that the "colt straved upon the track of defendant, in Jefferson township, Linn county, Missouri, at a point where said railroad passes along, through and adjoining inclosed, or cultivated fields or uninclosed lands, and was killed on said date by the engine and cars of the defendant in said township. said colt was killed, by reason of the failure of the defendant to erect and maintain good and sufficient fences, at said point as aforesaid." This statement negatives the idea that the colt might have been killed in an incorporated town, when it alleges that the killing occurred at a point where the road, "passes along through and adjoining inclosed" fields. And we think the statement is sufficient. Farrell v. Union Trust Co., 77 Mo. 475; Terry v. Mo. P. Ry Co., 77 Mo. 254, and authorities there cited.

II. The second point made by the appellant is as to

the third instruction asked by defendant.

That instruction, as asked, with the words, "and at the time said fence was broken," left out would have been subject to the objection made by the defendant, to-wit: it did not submit to the jury whether reasonable time had elapsed, between the breaking of the fence, and the injury to the colt, as to have enabled the defendant to discover and repair the break. If given as asked, it did not fix the time of the break, but as amended by the court and given, it did fix the time of the break as the time when the colt got over it, and as given, is not objectionable. The question as to the defendant suffering the fence to be and remain out of repair, and insufficient to prevent ordinary cattle and horses from getting over the same, was fully presented to the jury by the defendant's first instruction.

III. The appellant insists that the justice had no jurisdiction. That justices of the peace have jurisdiction for killing animals by railroads, when the amount demanded exceeds \$150, only when the killing was in the township in which the justice resides. This question does not arise in

this case. The amount demanded does not exceed \$150. The amount of the claim here sued for was \$100; the amount of the verdict was \$75. The judgment of the court was \$150, double the amount of the finding. This is by operation of law. The jurisdiction as to amount is governed by the sum claimed as single damages, not by the amount after the damages are doubled.

The judgment is affirmed. All concur.

STATE ex rel. FITZPATRICK V. MEYERS et al., Judges of the County Court of Nodaway County, Appellants.

Dramshop License, Petition for Signers: STATUTE. Under Revised Statutes of 1879, sections 5438, 5442, as amended by the act of the general assembly of March 24th, 1883, (Acts, pp. 87, 88,) the petition for a dramshop license, where the dramshop is to be kept in a block or square of a city containing 2,500 inhabitants or more, signed by two-thirds of the assessed tax-paying citizens of said block or square, is sufficient in respect to such signers, and the law being otherwise complied with by the applicant for the license, it is obligatory on the county court to issue it.

Appeal from Nodaway Circuit Court.—Hon. H. S. Kelley, Judge.

AFFIRMED.

S. R. Beech and W. C. Ellison for appellants.

Revised Statutes, section 5438, as amended by Laws of 1883, page 87, means that a dramshop petition shall be signed by two-thirds of the assessed tax-paying citizens of the city. Unless the legislature so intended, section 5438 would seriously conflict with section 5442, and a county court in many instances might be compelled to grant dramshop licenses on petitions containing less than one-half, one-

third or even one-fourth of the names of the tax-pavers in the block at the time of signing the petition. If the construction contended for by relator be correct, section 5438 compels all county courts to grant licenses on petitions signed by two-thirds of the tax-payers of the block, as shown by the last previous annual assessment of the city, and this will be the case although two-thirds of the taxpayers of so small a territory as a block as shown by assessment books a year or two old may not, and quite often do not, include a majority of the tax-paying citizens of the same block at the time the petition is signed. The construction which requires two-thirds of the tax-payers of the city, is the one most consistent with a rational and consistent purpose in the legislative mind. The retail liquor traffic is defined to be "a demoralizing and pauper-making business," (Semidt v. State, 14 Mo. 137,) and is a mere privilege, and in determining the extent to which the privilege goes, the law should be strictly construed against the traffic.

L. Isham White, John Edwards and Johnston & Anthony for respondent.

The legislature has provided in Revised Statutes, sections 5442, 5438, as amended by the act of March 24th, 1883, (Sess. Acts, pp. 87, 88,) for two classes of petitioners as respects the number of signers: 1st, A majority petition; 2nd, A petition of two-thirds. When a majority petition is presented, the court has jurisdiction to act, and may grant a license if the applicant be qualified; when a petition signed by two-thirds of the "proper names is presented, and the applicant is qualified," then the court shall grant such license. That is when the majority petition is presented, the courts have a discretion, and may grant or refuse the license as to them seems best, a matter of policy. When the two-thirds petition is presented, and the applicant is qualified, the court must grant the license as a matter of right; to hold otherwise would render the pro-

viso wholly inoperative, and why should a meaningless proviso be inserted in any statute? 1 Kent, 461, 462; Rule 36, Blackwell Tax Titles, (4 Ed.) 610 side p. "The most natural and genuine way of construing a statute, is to construe one part by another part of the same statute, and so that, if possible, no sentence, clause or word shall be treated as superfluous, void or insignificant, and especially where the two clauses are parts of the same section, inseparably connected with and necessarily dependent upon each other." State to use, etc., r. Richardson, 35 Mo. 385, 388. As the dramshop law stood prior to the amendments of 1883, the county court could not be compelled to grant license. State ex rel. Kyger v. Holt Co. Ct., 39 Mo. 521. Unless it had been the intention of the legislature to change the law, there had been no use of the proviso in section 5438, and the intention of the legislature should be carried out. ex rel. Mo. M. L. Ins. Co. v. King, 44 Mo. 283, 285. county court, in its final order disposing of the application of relator, Thomas Fitzpatrick, found in his favor as to every fact upon which the court heard and weighed the evidence and acted judicially. The license was refused solely on the ground that the petition filed with the clerk of the county court, December 6th, 1883, had not subscribed thereto the proper names of two-thirds of the tax-paying citizens of the whole of the city of Maryville, as shown by the last previous annual assessment of said city. Relator claims that no such petition is required by sections 5438 and 5442. of the Revised Statutes, as amended by the act of the legislature of this State, approved March 24th, 1883, (Sess. Acts 1883, pp. 86, 88,) and that said petition, containing as found and admitted in said order of the county court, the proper names subscribed thereto of two-thirds, and more of the assessed tax-paying citizens in block number 6, one of the blocks in said city, as shown by the last previous annual assessment of said city, was all that said amended sections required. If the relator's interpretation of the statute, is the true one, the error committed by the county court, is

an error of law, and may be corrected by the writ of man-Whenever the law vests in boards of supervisors or inferior courts, acting under statutory powers, certain prescribed duties which, in their character, are partly judicial and partly ministerial, if such tribunals have gone forward, in any given case involving the rights of the citizen, and fully performed the judicial part, the law imposes upon them an obligation to perform the ministerial part, and if they refuse to do so, whether through malice, caprice or an honest mistake of the law, if there is no other mode of relief for the party injured prescribed by law, mandamus will lie to coerce the performance of the ministerial part. People v. Board of Supervisors of Schenectady, 35 Barb. 408; Thomas v. Armstrong, 7 Cal. 286; People v. Supervisors of Otsego, 51 N. Y. 401, and 53 Barb. 564; High's Extra. Leg. Rem., (1 Ed.) § 327; Moses on Mand., pp. 41, 125, 126; Ex parte Milner, 6 Eng. Law and Eq. Rep. 371; People v. Perry, 13 Barb. 206. And even with respect to courts of general and common law jurisdiction, where the judgment on a question of law is wrong, and no remedy exists by appeal or writ of error, mandamus will lie, and in such proceeding the court having jurisdiction to issue the writ will interpret the law correctly, and prescribe what judgment therein should be given by the court to which the writ is directed. State ex rel. Harris v. Laughlin, 75 Mo. 358; Castello v. St. Louis Circuit Ct., 28 Mo. 259; Ex parte Cox, 10 Mo. 742; State ex rel. Webster v. Knight, 46 Mo. 83.

The alternative writ properly directed the judges of the county court, as a county court, to fix and assess the tax prescribed by section 5441, of the Revised Statutes as amended. That matter was to be determined without evidence. The clerk of the county court fixed it in vacation, under section 5446 of Revised Statutes. Said section 5441 is mandatory. It reads: "Upon every such license there shall be levied a tax not less than \$25, nor more than \$200, for State purposes, not less than \$250, nor more than \$400 for county purposes, for every period of six months; the

amount of tax in every instance to be determined by the court granting the license. Act of March 24th, 1883, amending section 5441, Sess. Acts 1883, p. 87. In fixing the amount of the tax, within the limits of the law, the judges of the county court act ministerially, as would the clerk in vacation. If so, their duty is clearly defined by the law, and they must perform it. State ex rel. Adamson v. Lafayette Co. Ct., 41 Mo. 221; State ex rel. Jackson v. Co. Ct. of Howard Co., 41 Mo. 247; State ex rel. School District v. Byers, 67 Mo. 706; High's Extra. Legal Rem., (1 Ed.) § 80.

Norton, J.—This is a proceeding to compel the county court of Nodaway county, Missouri, by the writ of mandamus, to issue a dramshop license to the relator.

On the 6th day of December, 1883, the relator, Thomas Fitzpatrick, filed with the clerk of the county court of Nodaway county, Missouri, under sections 5438 and 5442 of the Revised Statutes, a petition asking that a license be granted to him to keep a dramshop in his place, being a room on the ground floor in a certain brick building, having a frontage of twenty-two feet, situated on the east one-third of lot 2, in block 6, in the original town (now city) of Maryville, in Nowaway county, Missouri. This petition had subscribed thereto the proper names of two-thirds and more of the tax-paying citizens of said block, as shown by the last previous annual assessment of said city. At the adjourned term of the court of Nodaway county, held December 10th, 1883, said petition was laid before said county court, and relator made and filed his application as required by section 5438 of the Revised Statutes. This application was accompanied by the bonds required by sections 1601 and 5440 of said statutes, and certified copies of the affidavits required by sections 1601 and 1605 of said statutes. showing that the originals had been properly made and filed with the county clerk, and by a verified statement of liqnors on hand, as required by se tion 5439 of said statutes,

The application was heard by the county court December 10th, and continued to December 11th, 1883, at which last named date the county court made a final order in the matter.

In this order the county court finds that the relator is a person of good character; that the bonds and affidavits filed with the application and with the county clerk, are good and sufficient, as required by law; that relator was in no wise disqualified by any of the provisions of chapter 98 of the Revised Statutes to receive the license asked, and that the block in which the dramshop was sought to be located, is one of the blocks of the city of Maryville; that said city contained more than 2,500 inhabitants, and that said petition, filed with the clerk of the county court as aforesaid, December 6th, 1883, had subscribed thereto the proper names of two-thirds and more of the tax-paying citizens of said block, as shown by the last previous annual assessment of said city. This order eliminated from the case every fact necessary to be passed upon by the court, except the fixing of the amount of the State and county tax, as required by section 5441 of the Revised Statutes, and the court refused to issue the license, as stated in the ordersolely because said petition had not subscribed thereto the proper names of two-thirds of the tax-paying citizens of the whole of said city of Maryville.

On the 14th day of December, 1883, relator filed in the office of the clerk of the circuit court of Nodaway county, in vacation, his petition praying that an alternative writ of mandamus issue against the appellants, as judges of the county court of Nodaway county, directing them to assess said tax (as required by said section 5441) and issue said license to relator, or show cause to the contrary. On this petition the alternative writ was issued, as prayed, December 14th, 1883, by Hon. Henry S. Kelley, judge of the circuit court, returnable December 20th, 1883, that being the day fixed for the commencement of the adjourned term of

the said circuit court.

Defendants waived service of this writ, and entered their appearance thereto. The case came on for hearing December 26th, 1883, on the demurrer of defendants to the alternative writ. The court overruled this demurrer, and defendants declining further to plead, the court rendered final judgment in favor of relator, directing that a peremptory writ of mandamus issue against defendants, as judges of said county court, commanding them to fix and assess the tax on said license, and issue the same as prayed in the alternative writ. Defendants bring the case to this court by appeal.

The question decisive of this case is, whether a petition for a dramshop license, where the dramshop is to be kept in a block or square of a city containing a population of 2,500 inhabitants or more, should be signed by two-thirds of the assessed tax-paying citizens in such block or square, or by two-thirds of the assessed tax-paying citizens of the whole city, before it becomes obligatory on the county court to grant license to the applicant.

It is contended on the one hand, by counsel for defendants, that the law requires that such a petition should be signed by two-thirds of the assessed tax-paying citizens of such city, while it is contended on the other hand, by relator's counsel, that such petition is only required to be signed by two-thirds of the assessed tax-paying citizens in the block or square where the dramshop is to be kept. The solution of the question depends upon the construction of sections 5438 and 5442, Laws of 1883, page 87.

Section 5438, as amended, reads: "Applications for a license as a dramshop keeper, shall be made in writing to the county court, and shall state specifically where the dramshop is to be kept, and if the court shall be of opinion that the applicant is of good character, the court may grant a license for six months. Provided, however, that if the court shall be of the opinion that the applicant is a person of good character, and the petition required in section 5442 of this chapter contains the proper names subscribed thereto

of two-thirds of the assessed tax-paying citizens, as shown by the last previous annual assessment of the city, incorporated town or municipal township where such dramshop is to be kept, then the court shall grant such license."

Section 5442, as amended, reads: "It shall not be lawful for any county court, in this State, or clerk thereof in vacation, to grant any license to keep a dramshop in any town or city containing 2,500 inhabitants or more, until a majority of the assessed tax-paying citizens in the block or square in which the dramshop is to be kept, shall sign a petition, asking for such license to keep a dramshop in such block or square in such town or city, nor in any city containing less than 2,500 inhabitants, nor in any incorporated town or municipal township until a majority, both of the assessed tax-paying citizens therein, and in the block or square in which the dramshop is to be kept, shall sign a petition asking for such license to keep a dramshop therein."

It will be perceived that by said section 5438 it is made the duty of a county court to grant a dramshop license when satisfied that the applicant is of good character, and when the petition required by section 5442, contains the proper names subscribed thereto of two-thirds of the assessed tax-paying citizens, as shown by the last previous annual assessment of the city, incorporated town or municipal township where such dramshop is to be kept. We are thus referred by section 5438 to section 5442 to ascertain what petitions are required by this latter section, and by inspecting the said section it will be seen that when the petition is for license to keep a dramshop in a block or square of a city containing 2,500 inhabitants or more, it only requires such petition to be signed by a majority of the assessed tax-paying citizens in the block or square where the dramshop is to be kept, and that it was not the intention of the legislature to require such a petition to be signed by a majority of the tax-payers of the whole city, is clearly shown by the fact that the section provides that in cities containing less than 2,500 inhabitants the petition for a dramshop

license shall be signed not only by a majority of the assessed tax-paying citizens of the city, but also a majority of those in the block where the dramshop is to be kept. In other words, this section provides that in a city with a population of 2,500 or more, it is only necessary that the petition should be signed by a majority of the assessed tax-paying citizens in the block, where the dramshop is to be kept, but that in cities with less population than 2,500, the petition must be signed not only by a majority of the assessed tax-paying citizens in the block, but also by a majority of such citizens of the whole city.

When a petition is presented under section 5442, for a license to keep a dramshop in a city containing 2,500 inhabitants or more, if it is signed only by a majority of the assessed tax-paying citizens in the block where the dramshop is proposed to be kept, the county court, in their discretion, may or may not grant the license; but if such petition is signed by two-thirds of the assessed tax-paying citizens of such block or square, and the court is satisfied that the applicant is of good character, section 5438 declares that the court "shall grant the license." This language is imperative and mandatory, and deprives the court of discretion in the matter, and imposes on the court the duty of granting license to the applicant, if he be of good character, and complies with all the requirements of the statute as to filing affidavit, giving bond, etc.

It is contended by counsel for defendants that the following clause in section 5438, viz., "the proper names subscribed thereto of two-thirds of the assessed tax-paying citizens, as shown by the last previous annual assessment of the city," means two-thirds of the assessed tax-paying citizens of the city, as shown by the last previous annual assessment. This view is opposed to the plain reading of the section, and we know of no rule of construction which would lead us to the conclusion for which counsel contend.

We think the clause, "as shown by the last previous annual assessment of the city," means what it says; and 39-80

as by section 5442, such a petition as was presented in this case was required to be signed by two-thirds of the assessed tax-paying citizens in the block, and as the county court was required by section 5438 to ascertain whether the signers of the petition amounted in number to two-thirds of the assessed tax-paying citizens of such block, we are of the opinion that the legislature evidently intended nothing more by the use of the words "as shown by the last previous annual assessment of the city," than to declare that the county court in determining the question whether the signers of said petition were assessed tax-paying citizens, should be governed in their determination by the last previous annual assessment of the city, and no better rule for ascertaining who are assessed tax-paying citizens, could have been laid down than the one requiring the last previous annual assessment to be looked to as the evidence to establish this fact.

The judgment of the court awarding the peremptory writ is hereby affirmed. All the judges concurring.

STATE ex rel. ALLEN V. WALKER, State Auditor.

Criminal Costs: STATUTE. The State is not liable for the expense of boarding and lodging a jury incurred before the going into effect of the act of March 8th, 1883, (Laws, p. 80,) where, in the trial of a felony, it was not permitted to separate, and failed to agree on a verdict; and this is the case although the account for said expense was allowed and certified to the State Auditor by the trial judge and prosecuting attorney, after the going into effect of said act.

Mandamus.

WRIT DENIED.

L. F. Parker for relator.

The application of the act of 1883 to this case, would

not make it retrospective in its operation. Criminal costs are to be taxed and paid under the law in force when the bill is certified and as of that date. State ex rel. Brown v. Holladay, 70 Mo. 137; Lucas Bank v. King, 73 Mo. 590.

Smith & Krauthoff for respondent.

The act of the legislature of March 8th, 1883, amending Revised Statutes 1879, section 2093, should not be construed retrospectively. Cooley's Const. Lim., § 370; State ex rel. v. State Auditor, 52 Mo. 578; State ex rel. v. State Auditor, 41 Mo. 25; Sayes v. Wisner, 8 Wend. 661; Brown v. Wilcox, 14 S. & M. 127; Quackenbush v. Danks, 1 Denio 128; Haley v. Philadelphia, 68 Pa. St. 137; Clark v. Baltimore, 29 Md. 277; Bennett v. Fisher, 26 Iowa 497; Conway v. Cable, 37 Ill. 82; Atkinson v. Dunlap, 50 Mo. 111; Const., art. 3, § 15. In State ex rel. Brown v. Auditor, 70 Mo. 137, cited for relator, the State was liable for the charge therein, when the same accrued. The charge here made for furnishing board and lodging to the jury, was not expressly authorized by law. R. S. 1879, § 2110. See also Ib., § 5606. The fact that the judge and prosecuting attorney certify that a charge in a fee bill is authorized by law, is not conclusive on the auditor. Morgan v. Buffington, 21 Mo. 549; State ex rel. v. Auditor, 37 Mo. 175. All statutes relating to costs must be strictly construed. Shed v. Railroad Co., 67 Mo. 687; Bac. Abridg., Title Costs, "A."

Henry, J.—This is a proceeding by mandamus to compel the State Auditor to allow and audit an account for \$36, for boarding and lodging a jury empanneled to try the case of the State v. Michael Miller. Miller was indicted in the circuit court of Crawford county, and at the September term of said court, 1882, a change of venue was awarded, and the case was sent to Phelps county. At the February term, 1883, of the circuit court of that county, there was a mistrial, and the account in question was for boarding and

lodging of the jury then empanneled to try the cause. At an adjourned term of said court, held in October, 1883, the cause was again tried and Miller was acquitted, and, at the same term, the judge and prosecuting attorney examined and allowed said account. The question is, whether the State is, by law, chargeable with said costs.

By an act of the general assembly, approved March 8th, 1883, (Laws, p. 80,) it was provided that "in all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, the State shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, and the same shall be taxed as other costs in the case; and the State shall pay such costs, unless, in the event of conviction, the same can be made out of the defendant."

When this act was passed there was no law providing for the payment of such expenses as relator's claim is based upon. This is conceded. It was held in State ex rel. Brown v. Holladay, that "the law in force at the time the officer's claim is allowed and certified by the judge and prosecuting attorney, must control, and not the law in force when the services were rendered." 70 Mo. 137. The account in question was certified by the judge and prosecuting attorney in October, 1883. The act of 1883, supra, took effect ninety days after the adjournment of the general assembly by which it was enacted, and that assembly adjourned on the 2nd day of April, 1883, so that the act took effect July 1st, 1883. The language of this court in the State ex rel. v. Holladay must be construed with reference to the facts of that case, and in connection with the balance of the opin-

ion. Prior to 1879 the expense of boarding a prisoner sentenced to imprisonment was, by law, payable by the State, but by section 5608 the county is required to pay it. The expense in that case was incurred when it was, by law, payable by the State, and, after the Revised Statutes took effect, the account was duly certified, and although the language above quoted occurs in the opinion, yet the further observation is made that "the legislature has no power to deprive an officer of fees already earned by him, but the officer acquires no vested right to be paid out of any particular fund." In the case at bar, when the expense for boarding the jurors was incurred, it was not taxable as costs against the county or State. No provision of law authorized or required, either the county or State to pay it. The officer incurring the expense had no vested right to it as fees or costs, wherein this materially differs from the case of the State ex rel. Brown v. Holladay.

In order to award a peremptory mandamus here, we must so construe the act of 1883 as to give it retrospective effect, and this cannot be done, unless it be warranted by its terms. The language of the act must clearly show a legislative intention that it should operate retrospectively. Cooley's Const., Lim., 370; State ex rel. v. State Auditor, 52 Mo. 578; State ex rel. v. State Auditor, 41 Mo. 25. "Every act of the legislature must be held to be prospective in its operation, unless a different effect is clearly to be gathered from its terms;" (41 Mo., supra;) "and unless the language employed admits of no other construction." Nothing in the act of 1883 indicates a legislative intent that it should act retrospectively, and to grant to relator what he asks, the act of 1883 must be construed, not only as retrospective in its operation, but also as having the effect to create a liability against the State for expenses or costs incurred, which, under the law in force before its enactment, was not recognized as an obligation of either the county, or the State, but as an expense incurred by the officer who had no legal right to reimbursement from any quarter. In short, to create a

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debt of that which was not a debt against the State or the county before its enactment.

The demurrer to the alternative writ is sustained, and judgment accordingly. All concur.

RAWLINGS, Plaintiff in Error, v. Bean et al.

- Chattel Mortgage: FAILURE TO RECORD: SALE BY MORTGAGEOR IN
 POSSESSION. A mortgage of goods not recorded, and of which the
 mortgageor retained the possession, is a nullity as against a purchaser from such mortgageor in possession, even though the purchaser knew of the existence of the mortgage.
- 2. Misrepresentation as to Solvency: WHEN THIRD PERSON CANNOT MAINTAIN ACTION. A misrepresentation to one in regard to the solvency of him who makes it, gives no right of action in favor of a third person against the first for injury by reason of the second repeating such statement to the third person, no relation of principal and agent existing between the latter and the person repeating the statement, and the latter not having been authorized to communicate the statement to the third person.

Error to Cass Circuit Court .- Hon. Noah M. Givan, Judge.

AFFIRMED.

Robert Adams and E. J. Sherlock for plaintiff in error.

The court committed error in refusing to declare the law as asked by plaintiff.

M. Campbell for defendants in error.

Plaintiff's instructions one and four ask the court to order the jury to find for the plaintiff for the full amount of all the notes, without any proof of the false representations, and without a statement of demand, notice and failure to pay, or any proof that defendants are in any way held as indorsers on the Sellers' notes. Instructions must be

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predicated on the pleadings and evidence. Raysden v. Trumbo, 52 Mo. 35; Budd v. Hoffheimer, 52 Mo. 297; Russell v. State Ins. Co., 55 Mo. 585; Fitzgerald v. Hayward, 50 Mo. 516; Capital Bank v. Armstrong, 62 Mo. 59; Iron Mountain Bank v. Murdock, 62 Mo. 70.

Indorsers can only be held by presentment, demand and notice. Draper v. Clemens, 4 Mo. 52; Adams v. Darby, 28 Mo. 162; Simmons v. Belt, 35 Mo. 461; Nave v. Richardson, 36 Mo. 130; Armstrong v. Armstrong, 36 Mo. 225. Instructions two and six relate to the chattel mortgage, and ask the court to order the jury to find for plaintiff, if defendants knew of the mortgage, and plaintiff turned over, released or surrendered said mortgage because of false representations made by defendants of their solvency. These instructions omit to specify the date of such representations. If made before the trade, and to Rawlings, they might be pertinent. If made after the trade, the mortgage itself was void, even if known to exist. R. S., § 2503; Bryson v. Penix, 18 Mo. 13; Bevans v. Bolton, 31 Mo. 437. Plaintiff's remaining instructions were also properly refused. The mortgage was to the use of the mortgageor, and was void. R. S., § 2496; State v. Jacob, 2 Mo. App. 183; Lodge v. Samuel, 50 Mo. 204; The mortgage was not recorded, and was, therefore, void. R. S., § 2503; Bryson v. Penix, 18 Mo. 13; Bevans v. Bolton, 31 Mo. 437.

Philips, C.—To understand the questions arising on this record, it will be necessary to set out the pleadings with unusual detail.

The petition alleges that defendants, on the 29th day of December, 1874, executed three promissory notes to Joseph Roebuck, each for \$205.28, one due six months after date; one due twelve months after date, and one due eighteen months after date, each bearing ten per cent interest from date. That on the same day said Roebuck assigned, by indorsement, said notes to plaintiff for value. It is further alleged that Mary Sellers and William H. Sellers,

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by their promissory note of date October 15th, 1874, promised to pay to defendant Bean, or order, \$301.64, one year after date, with ten per cent interest from date; that said Bean assigned, by indorsement in blank, and delivered said note to his co-defendant, Whittenger, who assigned it by indorsement, and delivered it to said Roebuck, who assigned the same to plaintiff by delivery. That the firm of Sellers & Co., November 1st, 1874, executed their promissory note to said Bean, or order, for \$70, due seven months after date, with ten per cent interest from date; that Bean assigned, by indorsement, and delivered said note to said Whittenger, who assigned it in like manner to said Roebuck, and he, by delivery, to plaintiff. The petition then proceeds to set out that said Roebuck was the owner of a stock of drugs in Pleasant Hill, and on a sale thereof to defendants, the said notes were transferred by defendants to said Roebuck; that at the time of said transaction the said Roebuck owed the plaintiff the sum of \$1,500, which was secured by a chattel mortgage on said goods; that the defendants, in order to effect the purchase of said stock of drugs, etc., and the release of said mortgage, falsely, and with intent to defraud, represented to said Roebuck, and to the plaintiff, that the defendants were the owners of a large amount of unincumbered real estate and other property, which rendered them perfectly solvent and responsible on all their contracts; and further falsely and fraudulently represented that Mary and William Sellers, the makers of said last two notes, were solvent. That said Roebuck, relying on said representations, received the said notes for the consideration aforesaid, and the plaintiff, relying on the said representations to him made, received said notes from said Roebuck in payment of the debt Roebuck owed him, and released the said stock of goods from said mortgage. The petition then proceeds to negative the truth of the alleged representations made by defendants; and then avers that, but for the said representations so made by defendants, plaintiff would not have taken said notes in payment of

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his said debt and released said mortgage. It is then alleged that defendants refused to secure said notes, but continued to sell and dispose of said goods with intent to cheat and defraud the plaintiff. Wherefore he prays judgment for the sum of \$615.84, with interest, etc., on account of the three notes set out in the petition, and for the sum of \$301.64, with interest, on account of the fourth note, and for \$70, etc., on account of the last note named, "and for such other and further relief as equity may demand."

The answer admitted the execution of the three notes by defendants to Roebuck, and the transfer, by indorsement, of the notes of Mary and William Sellers to Roebuck, as also the notes of Sellers & Co., and that the last two notes were so transferred to Roebuck in part payment for the said stock of drugs, but denied the other allegations of the petition. For a second ground of defense, the answer pleaded that the stock of goods were situate in the county of Cass, and that the said Roebuck and plaintiff also resided in said county. That said alleged chattel mortgage did not describe said goods, so that they could be identified thereby; that said mortgage was never recorded in said county, nor were the goods ever delivered to the plaintiff, the alleged mortgagee, but remained continuously in the possession and control of the mortgageor, who continued to sell the same, etc. It is then pleaded that the defendants had nothing to do with the plaintiff in said purchase of the goods, that they never saw or heard of him until after the completion of the said purchase and delivery to them by said Roebuck of the goods; that the said mortgage was not mentioned to them during the negotiations, nor had they any notice thereof. On the contrary, said Roebuck represented that the said goods were unincumbered and free from lien or debt, and they so bought on the faith thereof. For a further special defense, the answer pleaded that the consideration of the first three notes had entirely failed on account of false and fraudulent representations made by said Roebuck. during the negotiations for said

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trade, touching the quality, condition and quantity of the goods in the store, specifying the deficiencies, etc.

The reply, after tendering the general issues as to the new matter pleaded in the answer, alleged, among other things, that the defendants bought said goods after making

a personal inspection of them, etc.

The evidence showed that the chattel mortgage was not recorded, and that said Roebuck continued in possession of, and to sell, the goods so mortgaged. Evidence was offered by both parties tending to sustain the issues respecting the alleged fraudulent representations by which, on the one side, the plaintiff gave up his mortgage and accepted the notes from Roebuck, and, on the other, touching the false representations as to the quantity and condition of the goods sold them by Roebuck. At the time of the consummation of the contract of sale, it does not appear that the defendants had seen the plaintiff, or made any representations to him whatever, as to their solvency, etc.

On the refusal of instructions asked by plaintiff and the giving those requested by defendant, the plaintiff took a nonsuit with leave, etc. After an ineffectual motion for rehearing, he has brought the case, on writ of error, to this court.

If a cause of action is to be determined from the facts stated in the petition, the conclusion is irresistible that the purpose of the pleader in framing this petition was to maintain an action ex delicto for the fraud and deceit, alleged to have been practiced by defendants in misrepresenting their solvency, etc. It is distinctly alleged, as the very gist of the complaint, that by reason of such fraud the plaintiff "received said notes from said Roebuck, in payment of the debt Roebuck owed him, and released said stock of goods from the operation of said chattel mortgage." This conclusion is evident throughout the entire petition. It was so understood by the defendant in drawing his answer, and very properly, as we think. No court would, for a moment, on reading over this petition, understand that it was an

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action ex contractu, based on the notes. There is only one count in the petition, and no separate judgment asked on each note. The amount of the notes, it is true, is designated in the prayer of the petition, but merely as the basis of the measure of damages consequent upon the surrender of the mortgage. If more were needed to point the character of the action, and the construction placed by the pleader, himself, on it, when he drew it, it is furnished by the record. The suit was brought on the 24th day of April, 1875, which was before the notes were due. It is, therefore, manifest that it was not designed as an action indebitatus assumpsit on the notes. Superadded to this, the liability of the defendants on some of the notes was that of indorsers. As such indorsers, action could be maintained against them conditionally only. The petition was evidently not framed on the theory of charging indorsers on notes, especially not yet due. Viewing the petition as sounding in tort, for the alleged false and fraudulent representations, whereby the plaintiff parted with his chattel mortgage to his injury, etc., the trial court would have been justified in instructing the jury to return a verdict for the The chattel mortgage was not recorded, nor did the mortgagee have possession of the mortgaged property. Therefore, as to the defendants who purchased from the mortgageor in possession, the mortgage was a nullity, even though they had notice of its existence. R. S., § 2503; Bryson v. Penix, 18 Mo. 13; Bevans v. Bolton, 31 Mo. 437. Any false representations made by defendants to Roebuck, touching their solvency, cannot avail the plaintiff. There is no pretense that the relation of principal and agent existed between Roebuck and the plaintiff. The plaintiff was not present when the representations, if any, were made, and the contract of purchase was consummated. Any subsequent statements made by Roebuck to plaintiff, as to what defendants said to the former touching their solvency, could not form the basis of an action, in favor of plaintiff, for the falsehood of the statement made by defendants to Roebuck.

Roebuck was not delegated by defendants to make any representations to plaintiff. The plaintiff recognized, in drawing his petition, the necessity of the representations being made to the plaintiff by the defendants, because it is averred that the said representations were made to Roebuck and the plaintiff by defendants. There was a total failure of proof as to this material averment.

The instructions asked by plaintiff were, mainly, based on the theory that the action was founded on the notes, and, therefore, the only relief defendants were entitled to, was a reduction from the notes of the difference between the value of the goods actually delivered by Roebuck to defendants, and what they were represented to be in the negotiation, as claimed by defendants. The instructions, at all pertinent to the issue tendered by the petition, either treated actual notice of the existence of the chattel mortgage as sufficient to bind the defendants as subsequent purchasers, or ignored the necessity of making proof that the alleged false representations were made by defendants to plaintiff, and that he acted thereon to his injury.

The judgment of the circuit court is, therefore, affirmed. All concur.

Johnson v. The Missouri Pacific Railway Company, Appellant.

1. Railroad: KILLING STOCK: DOUBLE DAMAGES: STATEMENT. A statement in an action before a justice of the peace, against a railroad for double damages for killing a horse, is sufficient which charges that the defendant, at a point on its road where the same passes along and adjoining inclosed and uninclosed lands, and not at a private or public crossing, ran over and killed the horse, and that defendant failed and neglected to erect or maintain good or sufficient fences on the sides of its road at the point where the horse got upon the track and was killed, and concludes with a prayer for double damages under the statute.

2. ——: STOCK: ESCAPE THROUGH ADJOINING PROPRIETOR'S PASTURE ONTO ROAD. Where, in such action against a railroad for killing plaintiff's horse, the evidence showed that plaintiff was not an adjoining proprietor within the meaning of the statute, and that his horse escaped from a pasture not coterminous with the right of way and through the inclosed field of an adjoining proprietor, it is necessary for the plaintiff to prove, before he can recover, that his horse was in the adjoining proprietor's field by authority, or that the fence of the field was not a lawful fence.

Appeal from Lafayette Circuit Court.—Hon. J. P. Strother, Judge.

REVERSED.

Smith & Krauthoff with T. J. Portis for appellant.

The plaintiff's statement was insufficient. It does not directly, or by implication, state that the alleged failure to fence in any wise occasioned the injury sued for. Hudgens v. H. & St. J. R. R. Co., 79 Mo. 418; King v. C., R. I. & P. R. R. Co., 79 Mo. 328; Luckie v. Railroad Co., 67 Mo. 245; Cunningham v. Railroad Co., 70 Mo. 202; Bates v. Railroad Co., 74 Mo. 60. Neither is it alleged, nor to be inferred, that the alleged getting upon the track and killing did not occur within the limits of an incorporated town or city. Schulte v. Railroad Co., 76 Mo. 324. The evidence showed that the plaintiff was not an adjoining proprietor, and that his animal was not lawfully upon land belonging to such proprietor. The horse was in a pasture belonging to one Cox, which did not adjoin the defendant's railroad. From this it escaped into a field belonging to one Barnett, and from that into a field belonging to one Gordon, and thence to the railroad. There is no evidence that the fences inclosing the fields or pastures of Cox, Barnett and Gordon, respectively, were not lawful. It was incumbent upon the plaintiff to show their defective character, and having failed to do so, the defendant's demurrer to the evidence ought to have been sustained. Berry v. Railroad Co., 65 Mo. 172; Harrington v. Railroad Co., 71 Mo. 384. The second in-

struction given for the plaintiff is erroneous. Clardy v. Railroad Co., 73 Mo. 576; Case v. Railroad Co., 75 Mo. 668; Walther v. Railroad Co., 78 Mo. 617.

No brief for respondent.

Ewing, C.—This suit was instituted before a justice of the peace, to recover double damages for the killing of a horse by a locomotive and train of cars of defendant, in

August, 1879, upon the following statement:

"Plaintiff states that the defendant is an incorporated company under the laws of this State, that on the - day of August, 1879, at Lexington township, in Lafayette county, Missouri, at a point on the track of defendant's railroad in said township, where the same passed along and adjoining inclosed and uninclosed lands, and not at a private or public crossing of said road, the defendant, by its agents, running its locomotive and train of cars, run the same upon and over a black horse, the property of plaintiff, and of the value of \$75, and thereby killed said horse; that defendant failed and neglected to erect or maintain good or sufficient fences on the sides of its road at the point where said horse got upon the track of said road and was killed, and that by reason of said killing, and by virtue of the 43rd section of chapter 63 of the General Statutes of Missouri, as amended by Laws of 1877. Whereupon plaintiff asks judgment for said sum of \$75, the value of said horse, and that upon final judgment the same be doubled as provided by statute."

The plaintiff had judgment before the justice, and defendant appealed to the circuit court, where on a trial *de novo*, judgment was again rendered against defendant, from which it has appealed to this court.

Upon the trial in the circuit court defendant objected to the introduction of any testimony, alleging that the statement did not state facts sufficient to constitute a cause of action. The objection was overruled, and defendant ex-

cepted at the time. The same objection is urged in this court.

The evidence shows that plaintiff's horse was in a pasture of one Cox, whose land does not adjoin the railroad at any place; that the horse got out of Cox's pasture into the inclosure of one Barnett, and from Barnett's field into the inclosed field of one Gordon, and from Gordon's land to the track of defendant; that plaintiff's land is a half mile from the railroad of defendant; that the fence on Gordon's land along the side of the track of the line of defendant's road was not good about 200 yards from where the horse was killed, and there was a place near by where the railroad fence was not more than two and a half feet high; that the horse could have got on the track near the place where he was killed; that he was found on the bridge outside of the track hanging through the timbers of the bridge.

Defendant asked the following instructions, which were refused by the court, and to the action of the court in refusing said instructions, defendant excepted at the time:

- 2. That the defendant is not required to fence its line of railroad where it passes through, along or adjoining inclosed and cultivated fields or uninclosed lands, except for the benefit of adjoining proprietors; and if the plaintiff was not at the time of the happening of the injuries complained of, an adjoining proprietor, either as owner or one having the right of possession, then they will find for the defendant.
- 4. If the plaintiff's horse is shown by the evidence to have been in pasture, in an inclosure belonging to Cox, which said inclosure is from one-third to one-half a mile from defendant's right of way, and that said horse got out of said inclosure into an inclosure on the west thereof, belonging to Gordon and Mrs. Catron, or either or both of them, and from thence to defendant's right of way, or that said horse got out of said Cox's inclosure on the east side thereof into inclosures belonging to Barnett and Gordon,

or either or both of them, and from thence to defendant's right of way, or that said horse got out of said inclosure on the south side thereof into the inclosed field of Gordon, and from thence upon defendant's right of way, and that plaintiff was not an adjoining proprietor, and owned no lands adjoining the defendant's right of way, then they will find for defendant.

A statement similar to the one in the case at bar, was held to be sufficient by this court in the case of Jackson v. St. L., I. M. & S. R'y Co., ante, p. 147; in that case the court says: "The statement that the defendant failed and neglected to erect or maintain good or sufficient fences where the mare got on the track, and the reference to section 809 of the Revised Statutes, imply that it was the duty of the defendant to erect and maintain fences at said place, and that the mare got on the track in consequence of such failure. Conceding that the implication stated is a conclusion of law, yet an issue raised on the statement of a legal conclusion, which presents the real point in controversy, will be regarded as sufficient after verdict."

No evidence was offered by plaintiff to prove that the fence inclosing Gordon's field, running to and adjoining the track of defendant, was not a lawful fence. Nor does the evidence show how the horse got into Gordon's field. Gordon's fence was a lawful one, and the horse broke over it and got onto the track of defendant, the defendant is not liable. In Harrington v. C., R. I. & P. R. R. Co., 71 Mo. 384, it was held that it was equally as incumbent upon the plaintiff, when not an adjoining proprietor, and not having the right to the possession, to show that the fence of the adjoining owner or proprietor was not a lawful fence, as it would have been if the horse had gone upon the track over a fence erected by the defendant along the line of its road under the statute. If the field of the adjoining owner or proprietor is sufficiently inclosed, that is all the protection strangers are entitled to. Berry v. Railroad Co., 65 Mo. In the case of Harrington, supra, the court says:

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"The duty of fencing the sides of their roads through inclosed or cultivated fields, is imposed upon railroad companies for the benefit of the owner or proprietor of such fields and inclosures. * * The cattle of a stranger which are on the premises of the adjoining proprietor, without right, are not within the protection of the statute."

The fourth instruction, asked by the defendant, did not fairly present this question to the jury. It simply said, if the jury believe from the evidence that plaintiff was not an adjoining proprietor, that his horse got onto the right of way through an adjoining proprietor's inclosed field, they must find for the defendant. This is not enough. And the fourth instruction was properly refused.

The second instruction, asked by defendant, and refused, was properly rejected. It is too broad and unqualified. The first instruction, asked by the defendant, to the effect "that upon the record and the evidence adduced at the trial, the plaintiff cannot recover," should have been given; because the evidence showing that the plaintiff was not an adjoining proprietor within the meaning of the statute, and that his horse escaped from a pasture not coterminous with the right of way, and through the inclosed field of an adjoining proprietor; it was necessary for him to prove, before he could recover, that his horse was in the adjoining proprietor's field by authority, or that the fence of the said field was not a lawful fence. 71 Mo. 384, supra; 65 Mo. 172, supra.

For refusing the first instruction asked by the defendant, the judgment must be reversed and the cause remanded. All concur. The State ex rel, Goldsoll v. The Chatham National Bank.

THE STATE ex rel. Goldsoll et al., v. The Chatham National Bank et al., Appellants.

- Husband and Wife: SEPARATE ESTATE. Personal chattels brought to this State from a foreign country, and being when so brought the separate estate of the wife, continue to remain her separate estate here, irrespective of her husband's consent, until divested of that character by her acts.
- 2. ——: EVIDENCE. In a contest between a wife and the husband's creditors, the latter, who asserted that the property in dispute was his, and not her separate estate, offered evidence to show that the husband had assessed the property in his own name, and also that he had taken out in his own name a fire insurance policy thereon. There was no evidence tending to show that this was done with the knowledge or consent of the wife; Held, that the evidence was incompetent to prove that any part of her separate estate had been relinquished by her, but was competent for the purpose of repelling the establishment of a separate estate in her as to any gift or acquisition from which his marital rights had not been excluded.
- 3. Jurors, Competency; Question of fact; Review of. The decision of a trial court in accepting or rejecting a juror, is the decision of a question of fact under the law; and it becomes the duty of such court to decide it like any other question of fact, and its decision ought not to be disturbed in the appellate court, if supported by evidence, because the seeming weight of evidence may be the other way.
- 4. Deposition of Party: ADMISSIBILITY OF. The deposition of a party to the cause as a written statement of facts, is admissible in evidence, although he be present to testify, or has testified.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Bradley D. Lee for appellant.

The action of the trial court in overruling the plaintiffs' challenges of the jurors Small and Hewlett for cause, was not erroneous. They were not disqualified as jurors under the statute of the State. Their answers to the questions asked them, were not such as to show that it would be impossible for them to try the case impartially. R. S., The State ex rel., Goldsoll v. The Chatham National Bank.

p. 469, §§ 2795, 2796; Eckert v. St. Louis Transfer Co., 2 Mo. App. 37; Baldwin v. State, 12 Mo. 223; McComas v. Covenant Mut. Life Ins. Co., 56 Mo. 573; State v. Hayes, 23 Mo. 287; State v. Holmes, 54 Mo. 153; Keegan v. Cavanaugh, 62 Mo. 230; O'Brien v. Vulcan Iron Works, 7 Mo. App. 257; State v. Walton, 74 Mo. 270; State v. Greenwade, 72 Mo. 298; State v. Core, 70 Mo. 461; State v. Barton, 71 Mo. 288. The trial court committed no error in its instructions to the jury. They correctly set forth the law as applicable to the facts proven in this case, and correctly stated the rules of law regulating the wife's separate property. Caughlin v. Ryan, 43 Mo. 99; Holthaus v. Hornbostle, 60 Mo. 437; Welsh v. Welsh, 63 Mo. 57. The action of the trial court in admitting the deposition of Mrs. Goldsoll in evidence was proper, as an admission, or declaration, or statement against her interest. 1 Greenleaf Ev., §§ 169, 212; 2 Wharton's Ev., § 1075, et seq; Kreitzer v. Smith, 21 Mo. 296; Charleston v. Hunt, 27 Mo. 34; Zimmer v. McLaran, 9 Mo. App. 591. The insurance policy and tax receipts were properly admitted in evidence, first, to contradict the testimony of the relatrix on material matters. Second, as tending to show her claim to the property was fraudulent, and that her husband had exercised acts of ownership over it.

Edward Cunningham, Jr., for respondent.

The action of the trial court in overruling plaintiffs' challenges for cause, was erroneous. Lyles v. State, 41 Tex. 172; Lester v. State, 2 Tex. Ct. App. 432; State v. West, 69 Mo. 401; State v. Taylor. 64 Mo. 358; Chouteau v. Pierre, 9 Mo. 3; Monroe v. State, 5 Ga. 139; Freeman v. People, 4 Denio 9. The action of the trial court in admitting in evidence the deposition of Mrs. Goldsoll was error. Gregory v. Cheatham, 36 Mo. 155, and cases cited; State v. Starr, 38 Mo. 278; Spaunhorst v. Link, 46 Mo. 197; Lohart v. Buchanan, 50 Mo. 202; State v. Elkins, 63 Mo. 165; State v. Foye, 53 Mo. 336. The admission in evidence of the insur-

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ance policy in the name of Meyer Goldsoll, and the tax returns made by him was error. Starkie on Ev., *58; Aiken v. Hodge, 61 Ill. 436; Hoyt v. Hoyt, 27 N. J. Eq. 399; Campbell v. Quackenbush, 33 Mich. 287; Pierce v. Hartrouck, 49 Ill. 23; Stewart v. Ball, 33 Mo. 154; Keeny v. Good, 21 Pa. St. 355; Gamber v. Gamber, 18 Ind. 363; Primmer v. Clabaugh, 78 Ill. 94; Ryan v. Merriam, 4 Allen 79; Eystra v. Capelle, 61 Mo. 578; Hambright v. Brockman, 59 Mo. 57; Paul v. Leavitt, 53 Mo. 595; Hearle v. Kreihn, 65 Mo. 205; State v. Arnold, 55 Mo. 91; State v. Jaeger, 66 Mo. 173. The trial court erred in refusing the instructions to the jury asked by plaintiff, and in giving those it gave of its own motion, touching the creation and continuance of a separate estate of a married woman. Riddick v. Walsh, 15 Mo. 519; Prichard v. Ames, Turner & Russ. 222; Holthaus v. Hornbostle, 60 Mo. 442; Gentry v. McReynolds, 12 Mo. 533; Coughlin v. Ryan, 43 Mo. 99; Welsh v. Welsh, 63 Mo. 57; Clark v. McGuire, 16 Mo. 302; Boal v. Morgner, 46 Mo. 48.

MARTIN, C.—This was an action on a bond of indemnity, given by the appellants to the sheriff of St. Louis, to indemnify Sarah Goldsoll for damages she might sustain by reason of the seizure, under writ of attachment, in favor of appellants, of certain personal property consisting of household furniture. The attachment was against her husband, and the property was seized as belonging to him. The answer denies the right of property in the wife, and alleges it as being in the husband at the date of the seizure. The jury found that certain articles sued for were presents given Sarah Goldsoll since the 25th of March, 1875, and for which they assessed damages in her favor in the sum of \$148.51. Judgment was rendered in favor of plaintiff in accordance with this verdict. The plaintiff appealed, and the St. Louis court of appeals reversed and remanded the cause. State ex rel. v. Chatham National Bank, 10 Mo. App. 482.

The case seems to have been elaborately presented to

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the court of appeals, which gave two decisions on the merits of the case, one being on the motion for rehearing. That court reversed and remanded the case for error in the trial court giving of its own motion the following instruction:

Touching the ownership of the property in controversy,

the court instructs the jury as follows:

1. If you believe from the evidence that Mrs. Goldsoll's father, prior to her departure for this country, gave her \$6,000, or any greater or less sum of money, for the purpose expressed at the time of the gift, that it was intended as a provision for the support of herself and children, and if you find that she also had at the time other money and jewels which she had earned and acquired whilst transacting business in her own name, and on her own account in Russia, and if you believe she brought with her to this country the funds thus given to her, and thus earned and acquired, and that after her arrival to the State of Missouri, by agreement between herself and husband to that effect, she continued to hold, manage and use said fund, and the property in which the same was invested as her individual property, free from the control of her husband, then, as a matter of law, the court instructs you that said fund thus acquired, held and used, (if it was so acquired, held and used,) by Mrs. Goldsoll, and any property in which the same was invested, continued to be the separate estate of Mrs. Goldsoll so long as it was so held, managed and used by her, and the same was not subject to seizure as the property of her husband for his debts, and if the jury believe that any of the property involved in this controversy described in the bond sued upon, was the property that Mrs. Goldsoll continued to hold as a part of her separate estate, in the manner above supposed on March 25th, 1875, that it was property purchased by her after said date, with her own separate money or means, then she will be entitled to recover the value of said property.

To understand this instruction in its application to the

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case, it will be necessary to rehearse the purport of the evidence as conceded by counsel on both sides.

The record shows that testimony was offered by the relator tending to prove that in the year 1862, she being then a married woman having children, received in Russia from her father a gift of about \$6,000 in Russian coin, and that said gift was made to her for her own use and benefit, to be kept from her husband, and to be applied by her, if necessary, in making provision for herself and her children, and that she had been engaged in business, manufacturing silver-ware, in Russia; that in the year 1862 she came with her children to St. Louis, bringing with her the said \$6,000, and about \$4,000 of her own earning, which she invested from time to time with her husband's consent.

That subsequently she sold out her interest in certain investments she had made, and converted her property into money and invested some of it in this furniture, and that some of this furniture was given to her by her friends and relations, and that none of it was purchased by her husband, and that he never claimed to exercise any acts of ownership or control over said personal property, and that said property was worth about \$3,000.

On the other hand, the defendant offered evidence tending to disprove all the facts which plaintiff's testimony tended to prove, and also other evidence tending to prove that all said personal property, except some articles of trivial value, were bought by said Meyer Goldsoll with his own money, and that none of said property belonged to said Sarah Goldsoll.

The court of appeals held that if the money given to her by her father in Russia, was given to her separate use, and if the money and jewels acquired there in business were acquired while transacting said business in her own name, and on her own account, so as to become her separate estate, all of such property remained to her separate use after her arrival in this country, and did not depend upon the agreement and consent of her husband for the continuThe State ex rel. Goldsoll v. The Chatham National Bank.

ance of its character as such. On reading the instruction at first, I was under the impression that it was not susceptible of the construction placed upon it by the court of appeals. It occurred to me that the court, in giving this instruction, intended it as applying to such gifts or acquisitions of the wife in Russia as did not exclude the rights of the husband under our laws. But its application to what we regard as her separate estate in equity, seems to be conceded by the learned counsel for the appellants in his brief, wherein he remarks: "The only substantial difference between this instruction and one upon the same question asked for by plaintiff, lies in the fact that the instruction of the court treats the consent or agreement of the husband as necessary to a continuance of a separate estate in Mrs. Goldsoll in the property in controversy." And accepting this to be the purport of the instruction, he contends that such agreement and consent were unnecessary. There being no evidence of the law of Russia as affecting the gift or acquisition in any way whatever, her rights therein must be disposed of according to our own laws. Flato v. Mulhall, 72 Mo. 522. And I have no hesitation in saying that whatever rights to separate property she possessed at the time of her arrival in this country, she would continue to possess in respect to that property, irrespective of the consent of her husband. Of course she could divest herself of these rights by her acts and deeds to that effect. But she would be protected here against the acts and doings of her husband, which might be in derogation of her rights and estate so acquired to her separate use. I am satisfied that the court of appeals was clearly right in reversing the case for the error of this instruction. If the gifts and acquisition had not been impressed with a trust of her separate use, exclusive of her husband, then whether it became so impressed after her arrival in this country in 1862, would depend upon the consent of the husband. That consent might have been manifested by an express agreement on his part, or by acts of his recognizing and approving her

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separate dominion and estate. McCoy v. Hyatt, ante, p. 130. In this I am not considering the effect or construction of the subsequent acts of 1865 or 1875.

During the trial the defendants, against the objections of plaintiff, were permitted to prove that Mr. Goldsoll had returned the property in controversy to the assessor as his. and had taken out a policy of insurance on it in his own name. There was no evidence tending to prove that this was done with the knowledge and consent of Mrs. Goldsoll. The court of appeals held this evidence to be incompetent. The difficulty attending this kind of testimony is incident to the procedure of common law courts protecting and enforcing the rights of married women which were originally only creations in equity and unknown at law. Of course, this evidence was incompetent to prove that any part of her separate estate as known in equity, had been relinquished by her or conferred upon her husband. Her consent was wanting. But as to any gift or acquisition from which his marital rights were not excluded, this evidence would be competent to repel the establishment of a separate estate, for the reason that no such estate could arise in respect to such property without his consent. This consent may be evidenced by declarations and acts, as well as by express agreements. If the jury should find that the gifts or acquisitions of property were not of such a character as excluded his marital rights thereto, or if they found the facts from which the law infers a general and not a separate estate of the wife, then this evidence is competent to prove that this general has never been changed into a separate estate, as claimed by plaintiff, but that it continued subject to the dominion of the husband at common law.

The objection raised to the qualification of juror Small does not become so important, in view of the necessity of reversing the case on other grounds. The court accepts or rejects jurors according to their qualifications under the law, to try the case in which they are called. The decision of the court accepting or rejecting a jutor, is the decision

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of a question of fact under the law, and it should be regarded in appellate courts like the decision of any other question of fact which it becomes the duty of the court to decide. If, when it comes up for review, it is supported by evidence, it ought not to be disturbed, although the seeming weight of evidence may be against it. The trial court is better able to pass on such a question than an appellate court. The juror in this case avowed his prejudice from the first. He had not conversed with either witnesses or parties, but had read some newspaper reports. He had no information from any source on the subject of ownership of the property claimed by plaintiff, which was the only issue in the case, and he had no opinion whatever on that issue. Nevertheless he avowed, after the challenge was overruled, that he had a prejudice that would require a considerable amount of evidence to remove, and asked to be excused from sitting. The impression made on my mind by a careful consideration of the examination of this juror is, that he had no actual disqualifying prejudice in the case, but that he was making what he regarded as a commendable effort to escape the burden and responsibility of an unpleasant and tedious trial. I do not think we would be justified in reversing the judgment of the trial court for its action in accepting this juror.

The deposition of Mrs. Goldsoll was competent evidence against her, being in the nature of admissions or statements adverse to her pretended rights. In Slatterie v. Pooley, 6 M. & W. 669, Lord Abinger, concurring with Baron Parke, stated, "that he had always considered it as clear law that a party's own statements were in all cases admissible against himself, whether they corroborate the contents of a written instrument or not." A party's deposition, as a written statement of facts, is admissible, although he may be present to testify or has testified. Kritzer v. Smith, 21 Mo. 296; Charleson v. Hunt, 27 Mo. 34; State v. Eddings, 71 Mo. 545; Zimmer v. McLaran, 9 Mo. App. 591.

For the reasons given herein, the judgment of the St.

Louis court of appeals, reversing the judgment of the St. Louis circuit court and remanding the cause, is affirmed. All concur.

SMITH et al., Appellants, v. SIMPSON.

- 1. Justices of the Peace: Jurisdiction, want of. Justices of the peace have no jurisdiction of causes in which both plaintiff and defendant are non-residents of the county in which the action is brought. (R. S., § 2839,) nor do the suing out and service by defendant of subpœnas for witnesses, and the filing of a motion by him to rule the plaintiff to security for costs before moving to dismiss for want of jurisdiction, constitute such an appearance as to confer jurisdiction on the justice.
- Semble, that consent even could not give jurisdiction in such a case.

Appeal from Madison Circuit Court.—Hon. James D. Fox, Judge.

AFFIRMED.

B. B. Cahoon for appellant.

The justice had jurisdiction of the subject matter of the suit. R. S. 1879, § 2835. And the action of the defendant in subpænaing witnesses and in filing a motion to rule the plaintiff to give security for costs, constituted such an appearance in the cause, as to give jurisdiction of his person. R. S. 1879, §§ 3052, 2849, 2837, 348; Page v. Railroad Co., 61 Mo. 79; Bohn v. Devlin, 28 Mo. 319; Orear v. Clough, 52 Mo. 56; Dellinger v. Higgins, 26 Mo. 182; Hembree v. Campbell, 8 Mo. 572; Chouteau v. Allen, 70 Mo. 353; Peters v. Railroad Co., 59 Mo. 408; Fedder v. Schroeder, 59 Mo. 366; Griffin v. Van Meter, 53 Mo. 431; Market St. B'k v. Stump, 2 Mo. App. 547; Davis v. Wood, 7 Mo. 162; Meyers v. Woolfolk, 3 Mo. 246; Barnett v. Lynch, 3 Mo. 261;

Hurlett v. Nugent, 71 Mo. 135; Evans v. King, 7 Mo. 411; Whiting v. Budd, 5 Mo. 447; Griffin v. Samuel, 6 Mo. 50; Atwood v. Reyburn, 5 Mo. 533.

Jno. E. F. Edwards for respondent.

Ewing, C.—This is a suit commenced before a justice of the peace in St. Michael township, Madison county, by summons, which was returned by the constable as served in St. Michael township, Madison county.

It appears that, at the time, plaintiffs were residents of Bollinger county, and the defendant a resident of St. Francis county. The suit was to recover \$25 for the alleged conversion of a "steer" by the defendant. Prior to the return day of the summons the defendant procured subpænas for his witnesses to be issued by the justice; had himself appointed special constable for the service thereof; and on the return day of the summons the defendant made return, in writing on the subpæna, of the service thereof on his witnesses, who also resided in St. Francis county, and marked his fees thereon, \$3.85, for serving them. On the return day the defendant filed a motion to rule the plaintiffs to give bond for costs, upon the grounds as follows: "The defendant, for the one purpose only, comes and moves the court to require plaintiffs to give security for costs, 1st, Because plaintiffs are not residents of said county. 2nd, That plaintiffs have no property in said county subject to execution." The bond for costs was thereupon given. Whereupon the defendant filed his motion to dismiss, (appearing, as alleged in the motion, for that purpose only,) "upon the ground that the court is without jurisdiction of the person of both the plaintiffs and defendant; the former being residents of Bollinger county, and the latter a resident of St. Francis county." The justice of the peace overruled this motion; the defendant retired, and judgment was taken against him by default, from which he appealed to the circuit court. On the calling of the case in the circuit court, the defendant renewed his motion to dismiss for want of

jurisdiction, for the same reasons set forth above, which motion was sustained, and the plaintiffs appealed to this court.

In support of the motion to dismiss, the evidence on both sides tended to show, and it was admitted, that neither plaintiffs nor defendant were residents of Madison county.

I. Under this state of facts, it is insisted by the appellants that there was such appearance by the defendant as waived the question of jurisdiction. That filing motion for costs, procuring the issue of subpænas for witnesses, preparing for trial, and being present on the day of trial with his witnesses, is a waiver of the jurisdiction of the court. That the action of the court in sustaining the motion to dismiss was error; and cites section 3052, Revised Statutes 1879, as being decisive of the question. That section is as follows: "Upon the return of the justice being filed in the clerk's office, the court shall try and determine the same anew, without regarding any error, defect or other imperfection in the original summons, or the service thereof, or on the trial, judgment, or other proceedings of the justice or constable in relation to the cause." I cannot agree with the learned counsel for appellants in the construction of this section. The errors, defects and imperfections refer to the informality of the summons, or the service thereof, on the defendant; or to some informality in the service of papers by the constable or justice in the trial, or in making up his judgment. It would hardly be contended, that if no service or appearance of the defendant appeared upon the transcript of the justice, and an appeal was granted on his application, the circuit court could acquire jurisdiction and try the case, unless the defendant should come into court and enter his voluntary appearance, or should so move in the case that his act would waive the necessity of summons. That would amount to judgment without notice, which our law does not permit. And, therefore, the section quoted does not apply in a case like this. Here it is a question of jurisdiction of the person which cannot

be acquired, unless with notice, or a waiver thereof, either directly or constructively.

II. But the main question in this case is, did the justice have jurisdiction at all, even though the summons and its service were ever so formal. It is well settled that courts of inferior and limited jurisdiction, not proceeding according to the course of the common law, are confined strictly to the authority given. State v. Metzger, 26 Mo. 65; Hansberger v. Pacific R. R. Co., 43 Mo. 196; 9 Wheat, 549. Justices of the peace then must get their authority from the statute. That fixes the manner and place of bringing the suit, and prescribes the territorial jurisdiction in which suits before justices may be maintained. Section 2839, Revised Statutes, provides that: "Every action shall be brought before some justice of the township, either: 1st, Wherein the defendants, or one of them, resides, or in any adjoining township; or, 2nd, Wherein the plaintiff resides, and the defendant, or one of them, may be found; 3rd, If the defendant is a non-resident of the county in which the plaintiff resides, the action may be brought before some justice of any township in such county where the defendant may be found: 4th, If the defendant in any action is a non-resident of the State, or has absconded from his usual place of abode, the action may be brought before any justice in any county in this State wherein the defendant may be found." The third sub-division of this section is, that alone under which suit may be commenced, in a case where the defendant is a non-resident of the county wherein the plaintiff resides. The phrase "such county," in that subdivision, must refer to the county wherein the plaintiff resides. It cannot refer to any county wherein defendant may be found, because that contingency is provided for in the fourth sub-division, under which you may sue when the defendant is a non-resident of the State. So that the third sub-division must govern, if any, because the defendant is a resident of the State, and hence could not be sued under the fourth clause. He was not served with process in the

county where he resides, as required under the first and second clauses, nor was the suit in the county where the plaintiff resides and where the defendant "may be found." But not being sued in "such county" where the defendant "may be found," which we have seen under the third clause must be the county where the plaintiff resides, we must conclude that even the third clause of this section did not authorize the commencement of this action. And there is no statute, that I am aware of, which authorizes a plaintiff, resident of one county, to sue a defendant, resident in a different one, in a third county where neither plaintiff nor defendant resides.

In Peery v. Harper, 42 Mo. 131, the plaintiff commenced his suit in Polk county; one of the defendants, Smith, resided in Henry county, and the other defendant, Harper, in Saline county. Harper filed his answer stating that neither plaintiff nor defendants resided in Polk county, and prayed that the case be dismissed. This answer was stricken out. and judgment rendered against defendants. Wagner, J., in delivering the opinion of the court, said: "If the answer was true, it divested the court of all jurisdiction. Under the law governing the case when the plea in abatement was found for the defendant, the whole proceedings should have been abated; but even on the theory on which the case was tried, that it was regulated and controlled by the 42nd section of the attachment act of the General Statutes, the judgment was erroneous; for that section declares that, when issue joined on plea in abatement is found in favor of defendant, the suit shall not abate, but shall be proceeded upon to final judgment as though commenced originally by summons alone. Now this practice act provides that in suits instituted by summons, they shall be brought when the parties all reside in the State, either in the county within which the defendant resides, or in the county within which the plaintiff resides and the defendant may be found. One of the parties must reside in

the county where suit is brought, in order to confer jurisdiction." Hembree v. Campbell, 8 Mo. 572.

In the case at bar, before a court of limited jurisdiction, there was no such appearance as would waive jurisdiction; nor do we think the appearance would, even in a court of general jurisdiction, be sufficient, under the facts of this case, to give such court jurisdiction. The federal courts are limited by statute in their jurisdiction as to the person. Two citizens resident in this State, cannot confer jurisdiction on those courts in a suit between themselves by consent. No power exists in those courts to adjudicate questions between individuals residing in the same state, and notwithstanding they should consent that that court might try the controversy, yet that would not confer jurisdiction, and such case would be stricken from the docket.

The judgment of the circuit court must be affirmed. All concur

Monks et al., Appellants, v. Belden et al.

Estoppel: ADMISSIONS. An admission made by one party to another, is not sufficient to create an estoppel in pais, unless the party to whom it was made acted upon it. The party claiming the benefit of the admission must show that his action was influenced by it, before he can set it up, or rely upon it.

Appeal from Howell Circuit Court.—Hon. J. R. Woodside, Judge.

AFFIRMED.

Hamilton & Fisher for appellants.

It has been held by this court that to establish an estoppel in pais, there must be, 1st, An admission inconsistent with the evidence proposed to be given, or the claim offered to be set up; 2nd, Action by the other party upon

such admission; 3rd, An injury to him by allowing his admission to be disproved. Taylor v. Zepp, 14 Mo. 482; Spurlock v. Sproule, 72 Mo. 503; Acton v. Dooley, 74 Mo. 63. Monks was led to believe that the defendants had no claim except the attachment, and acting on that presumption, took a bill of sale and defended Arnold. Where a man by his conduct knowingly causes others to believe in the existence of a certain state of things, and such others are thereby induced to act on such belief to their injury, he will be concluded from averring, as against the latter, a different state of things. Chouteau v. Gooding, 39 Mo. 229; Gerhart v. Finney, 40 Mo. 449; Price v. Sims, 34 Mo. 446; Fletcher v. Holman, 25 Ind. 458; Big. on Estop., 496; Anomet v. Young, 14 La. An. 175; Smith v. Taylor, 14 La. An. 663.

Livingston & Green for respondents.

Norton, J.—This suit was brought to recover damages for the alleged wrongful taking of a certain horse by defendants, and alleged to be the property of plaintiffs. The answer was a general denial, and on the trial defendants obtained judgment, from which the plaintiffs have appealed.

It appears from the record that the horse in question was originally owned by Arnold, one of the plaintiffs; that said Arnold, who was arrested on a charge of burglary and larceny, employed Monks, his co-plaintiff, to defend him against this charge, and in part payment of Monks' fees, gave him a bill of sale of the horse then in the possession of defendants. It further appears that Monks afterward demanded the horse of defendants, who refused to give him up, alleging that they held him by virtue of his having been levied upon in an attachment by them instituted against Arnold. It appears further, that the horse was sold under this proceeding, and the defendants purchased him at the sale made by the constable; it was admitted on the trial that these attachment proceedings were void, because

Arnold had received no notice of them. Defendants then introduced evidence tending to show that previous to the institution of the attachment proceedings, Arnold sold them the horse in payment for damages done by Arnold to the goods of defendant. This evidence was objected to, on the ground that defendants having claimed the horse under the attachment proceedings, were estopped from setting up this previous purchase of the horse. This objection was overruled, and the court also refused to give the following instructions asked for by plaintiffs:

- The court declares the law to be, that if the defendants relied upon a contract alleged to have been made between Arnold and defendants after his arrest, and while in the custody of an officer under the direction of defendants, and afterward sued out a writ of attachment before a justice of the peace, and directed the constable to seize the horse sued for by plaintiffs, and claimed by the defendants on the contract as the property of Arnold, and that said constable seized said horse under the direction of defendants, as the property of Arnold, and that defendants prosecuted their case to final judgment, and caused the constable to expose said horse to sale by virtue of an execution issued on said judgment as the property of Arnold, and purchased by the defendants at the sale as the property of Arnold, then they are estopped from claiming under the first contract.
- 2. The court declares the law to be, that if Arnold sold the horse mentioned in plaintiffs' petition to Wm. Monks, one of the plaintiffs in said cause, and made a bill of sale to said horse, and that afterward the defendants sued out a writ of attachment before a justice of the peace, and never had service on Arnold, either constructive or actual, and caused said horse to be sold by virtue of the execution and judgment, as the property of Arnold, and the defendants, or one of them, was present, aiding and directing the constable to make such sale, and the defendants, or one of them, bid in the horse at the sale as the property of Arnold,

and one of the plaintiffs demanded said horse, and defendants refused to give up said horse, the pretended attachment and the sale of said horse under said attachment was void, and defendants were guilty of trespass, and plaintiffs are entitled to recover.

The reception of the above evidence, and the refusal of the foregoing instructions, are the errors assigned.

An admission or assertion made by one party to another, is not sufficient to create an estoppel in pais, unless the party to whom it was made acted upon it. Taylor v Zepp, 14 Mo. 482; Acton v. Dooley, 74 Mo. 63; Spurlock v. Sproule, 72 Mo. 503. The question, as to whether Monks was influenced in taking the horse in part payment of his fee, by the assertion, in effect, made by defendants when they caused the horse to be levied upon as the property of Arnold by the writ of attachment, that the horse was Arnold's, was for the jury to pass upon; the court, therefore did not err in receiving the evidence objected to, inasmuch as, if the jury should find that Monks did not act on the assertion thus made by defendants, they would be at liberty to find that defendants acquired title to the horse independent of the attachment of the attachment suit.

It will be perceived that the refused instructions ignore one of the chief elements of estoppel, viz., that the party claiming the benefit of the doctrine must show that his action was influenced by the matter asserted, before he can set it up or rely upon it. Under the instructions refused, the jury would have been authorized to give plaintiffs a verdict, without finding that Monks, in buying the horse, was in any manner influenced by the acts of defendants in the attachment proceedings. If, as indicated in the second instruction asked, Monks bought the horse of Arnold before defendants instituted the attachment proceedings, he could not have been influenced to do so by anything that was done under them. Because this element of estoppel was ignored by the instructions, they were properly refused.

Judgment affirmed, in which all concur.

The State v. Briscoe.

THE STATE V. BRISCOE, Appellant.

Criminal Law: INFORMATION: CONSTITUTION. The general assembly has no power under the constitution, to authorize criminal prosecutions by informations in the form of an affidavit of a private person, in lieu of informations as understood at common law. Affirming State v. Kelm, 79 Mo. 515.

Appeal from Scott Circuit Court. — Hon. J. D. Foster, Judge.

REVERSED.

Smith & Krauthoff for appellant.

No information signed by the prosecuting attorney having been filed against the defendant, the judgment should be reversed. State v. Huddleston, 75 Mo. 667; State v. Sebecca, 76 Mo. 55. Under the constitution, article 2, section 12, it was necessary that the information should be one sufficient at common law. Ex parte Slater, 72 Mo. 102; State ex rel. v. Leffingwell, 54 Mo. 458, 471; Ex parte Bethurum, 66 Mo. 545; Cooley Const. Lim., 60; Potter's Dwarris on Statutes, p. 272, note 2. As to what constitutes an information at common law, see 5 Bac. Abr., title "Information," pp. 169, 170, et seq; Toml. Law Dic., title "Information;" Jacob's Law Dic., title "Information;" 2 Hawkins Pleas of Crown, ch. 26, § 4; 1 Bishop Crim. Proc., (3 Ed.) § 144; Rex v. Phillips, 3 Burr. 2090. The judgment should be reversed because the record does not show an arraignment of the defendant before trial. State v. Billings, 72 Mo. 662.

D. H. McIntyre, Attorney General, for the State.

Sherwood, J.—The defendant was charged in an affidavit filed before Wm. A. Gooch, a justice of the peace, with having kissed and indecently assaulted a girl, who was a scholar in the school which he was teaching. The affidavit was made by her father, June 19th, 1880.

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This proceeding is, doubtless, authorized by sections 2025 and 2026, Revised Statutes 1879. The authorities cited by counsel for the State, as well as counsel for the defendant, correctly define the meaning of the term "information," as it was used and understood at common law. . That definition does not embrace an affidavit filed by a private person. Section 12 of article 2 of our constitution. which is commonly called our "Bill of Rights," after providing: "That no person shall, for felony, be proceeded against criminally otherwise than by indictment, except," etc., makes further provision that, "in all other cases, offenses shall be prosecuted criminally by indictment or information as concurrent remedies." In Ex parte Slater, 72 Mo. 102, when speaking of the same section above quoted, it was said by Norton, J., "the word indictment has a well defined meaning, and must be accepted and understood as having been inserted in the constitution with the meaning attached to it at common law." Under the authority of that case, and by parity of reasoning, the term "information" must be held as bearing, since its incorporation into section 12, supra, the same signification as it did at common law. "Offenses" are embraced under but two heads, felonies and misdemeanors. The offense charged herein, obviously fell in the latter class, and if the constitution is to be obeyed, cannot be punished except by proceedings which take the shape of either an indictment or an infor-The present proceeding is not included under either of those heads, and the fact that the legislature has seen fit to call an affidavit an information, does not make it one, nor confer on it either the form or functions of an information. The provisions of the bill of rights are limitations on the powers of the government.

That eminent jurist, Mr. Justice Cooley, says, that "every thing in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void.

* While they continue in force, they are to remain absolute and un-

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changeable rules of action and decision." Const. Lim., (3 Ed.) 40, 41. It will not do to say that an affidavit, such an one as under consideration, and as authorized by sections 2025 and 2026, violates no substantial rights of the accused; that he has his trial by jury just the same as if the more formal information were officially filed; nor that the statutory information will do just as well, for an all-sufficient answer to these positions and assertions is to point to the provisions of the bill of rights, and say, that as the statute does not conform to those provisions, the statute must give way, and that those provisions being beyond governmental control, cannot be ignored, escaped from, or, in any way or manner whatsoever, modified by any department of the government, or by all the departments of the government combined. It was upon this theory, that section 1804, Revised Statutes 1879, which provides that an indictment, in certain circumstances, might be found in a county other than that in which the offense was committed, was held null, in that it was contrary to the bill of rights.

It may be remarked, that at the present term of this court sections 2025 and 2026, have passed under review in the case of the *State v. Kelm*, 79 Mo. 515, and have been held obnoxious to constitutional objections.

For these reasons the judgment must be reversed, and as the prisoner is held without any constitutional authority for his detention, his discharge is hereby ordered. All concur.

KINGSLAND et al. v. DRUM, Administrator, et al., Appellants.

- 1. Personal Property: SALE: EVIDENCE OF TERMS. In a suit by plaintiffs to set aside a chattel mortgage to a third person, because they, as the vendors of the mortgageor, had, by the terms of the sale to him, reserved the property in themselves until it was fully paid for, it is competent for the plaintiffs to prove the terms of said contract of sale, either by the evidence of a person present when it was made, or by the admissions of the vendee in reference thereto, made by him while in possession of the property.
- MORTGAGEE: NOTICE OF PRIOR CLAIM. A mortgagee of personal property, who takes it with notice of an agreement that it should remain the property of the mortgageor's vendor until fully paid for, is bound by such agreement.

Appeal from Cape Girardeau Circuit Court.—Hon. D. L. Hawkins, Judge.

AFFIRMED.

Wilson Cramer for appellants.

The evidence shows that appellants took the mortgage in good faith, for the purpose of securing a just debt. The law declared by this court in Wangler v. Franklin, 70 Mo. 659, and Robbins v. Phillips, 68 Mo. 100, was radically changed by act of the legislature of April 2nd, 1877. R. S., § 2507. Assuming that the evidence established a conditional sale, the condition was not evidenced by writing, as required by the foregoing act, and was, consequently, void, and the petition, failing to allege the execution of such writing, does not state facts sufficient to constitute a cause of action. The petition does not claim that the sale to Eisenberg was on condition, but that his vendors should retain a vendor's lien until the purchase notes were paid. The evidence shows that possession of the machine and horse-power was delivered to the purchaser, and this operated as a waiver of the vendor's lien. Sigerson v. Kahmann, 39 Mo. 206; S. W. Freight, etc., v. Stanard, 44 Mo.

71; S. W. Freight, etc., v. Plant, 45 Mo. 517; Benjamin on Sales, (2 Am. Ed.) § 799.

R. B. Oliver for respondents.

The evidence shows there was a contract or agreement between respondent and Eisenberg at the time of the sale of the machine and power, that the latter was to have the use and possession of the same, with a lien for the purchase price in favor of the former, until fully paid for. Such contract was binding, both on the parties to it and on all taking the property with notice of the same. Parsons on Contracts, (6 Ed.) side p. 494; Webb v. Ins. Co., 14 Mo. 3; Johnson v. Jeffries, 30 Mo. 423; Wangler v. Franklin, 70 Mo. 659. This court will not disturb a finding of the lower court because it is against the weight of evidence. Rea v. Ferguson, 72 Mo. 225; Price v. Evans, 49 Mo. 396; Penn v. Lewis, 12 Mo. 161. The trial court should give such relief as the pleading and facts warrant. Henderson v. Dickey, 50 Mo. 161; Merchants B'k v. Evans, 51 Mo. 335; Wright v. Barr, 53 Mo. 340; White v. Rush, 58 Mo. 105; Ames v. Gilmore, 59 Mo. 537. The judgment of the trial court is fully sustained by the evidence and right. 36 Mo. 138.

Nortox, J.—This suit was instituted for the purpose of setting aside a certain deed of mortgage executed by one Eisenberg, conveying to defendant Drum a certain threshing machine and horse-power, to secure him in the payment of certain debts therein mentioned. The mortgage was executed on the 10th day of August, 1878, and the validity of it is assailed by plaintiffs on the ground that said mortgage was without consideration, and that when it was executed defendant, Drum, had notice that said plaintiffs had a lien on said property for the purchase money, and that said machine and horse-power were sold by plaintiffs to Eisenberg with the understanding and agreement that their lien was to continue on the property till it was paid for. The petition sets up other matters, which it is

not deemed necessary to notice, in order to a proper understanding of the controlling point involved in the case. The defendant, in his answer, puts in issue the averments of the petition as to said mortgage being taken without consideration, and with notice of plaintiffs' claim on the property. The court found for plaintiffs and rendered judgment accordingly, from which defendant has appealed.

It is contended by counsel for defendant that the evidence does not show a sale by plaintiffs to Eisenberg of the property in question, on the condition that the property was to remain the property of plaintiffs till it was paid for; and that if the evidence establishes that fact, there is no evidence showing that Drum had notice of it, at or before

the time he took the mortgage on it.

As to the first of the above points, it must be ruled against the defendant. Mr. Mattingly, a witness on the part of plaintiffs, testified as follows: "Eisenberg came down on the boat with the machine, and had it landed at Wittenberg. I asked him upon what terms he had purchased the machine, and he told me he had executed two notes for the purchase money, one payable in August and the other in October. I also asked him if the machine and horse-power were to remain the property of Kingsland, Ferguson & Co. till the notes were paid, and he said they were." This conversation was in July, 1878. The evidence was objected to on the ground of irrelevancy, it not being shown that Drum was present. This objection was properly overruled. It was competent for plaintiffs to show the terms of sale agreed upon, either by proving the contract by a person present when it was made, or by proving it by the admissions of Eisenberg, a party to it, such admissions having been made before the mortgage to Drum was given, and while Eisenberg was in possession of the property. 1 Greenleaf Ev., § 190. See also 21 Mo. 522 and 444; 36 Mo. 326; 24 Mo. 221. It was for plaintiffs to show, as the first necessary step to make out their case, that it was agreed between plaintiffs and Eisenberg that the property in the machine

and horse-power was to remain in plaintiffs till they were paid for. This contract, however, under section 2507 of the Revised Statutes, could not affect the rights of Drum under his mortgage, unless the other evidence in the case showed that Drum had notice of it at or before the time the mortgage was taken. In the cases of Wangler v. Franklin, 70 Mo. 659, and Robbins v. Phillips, 68 Mo. 100, it was held "that when property was sold on the condition that the title was to remain in the seller until the purchase money was paid, the contract is a valid one, and will be respected and enforced by the courts even against a bona fide purchaser." Section 2507, supra, works a radical change as to the law in this respect, in that it provides that such condition in regard to the title remaining in the seller until the purchase price is paid, "shall be void as to all subsequent purchasers in good faith, unless such condition shall be evidenced by writing, executed, acknowledged and recorded, as provided in cases of mortgages of personal property."

The only question, then, remaining to a proper disposition of the case is, was Drum a subsequent purchaser in good faith. If he took the mortgage in dispute without notice of the fact that the machine and horse-power were to remain the property of plaintiffs, he was a purchaser in good faith; on the other hand, if he took it with notice of that fact, he was not a purchaser in good faith. are of the opinion that the evidence tends to show that Drum had notice of that fact, and the circuit court so found. Drum was examined as a witness, and it appears from his testimony that he had taken a deed of trust from Eisenberg on all his property, real and personal, to secure him in certain debts therein mentioned, including in said deed forty-one acres of land, the homestead of Eisenberg, and having understood that there was a judgment of \$500 against Eisenberg, and that there was some question about title; he called on Eisenberg for a mortgage on the machine and horsepower, and in this connection further stated as follows:

"At the time I took the mortgage, did not know whose machine it was; Eisenberg was in possession of it, and claimed it; did not know Kingsland, Ferguson & Co. claimed to have a lien on the machine; of course it was in their name; that is, their name was on it as manufacturers." Upon being asked if it was not notorious in the neighborhood that Kingsland, Ferguson & Co. claimed a vendor's lien on the machine, he said: "I can't tell whether it was or not. I never heard much about it. That Eisenberg got the machine from Kingsland, Ferguson & Co., was generally known; the machine had the firm name upon it. Have no recollection of having heard that it was Kingsland, Ferguson & Co.'s machine. It was notorious at that time that Eisenberg was insolvent. Am certain I never heard of their setting up any claim before I took a mortgage on it. Don't now remember the date of my mortgage. Some time after the execution of the mortgage to me, I heard it reported that Kingsland, Ferguson & Co. claimed a lien on the machine; how long afterward I do not now remember. Eisenberg executed them a mortgage on the machine."

On his cross-examination, he stated as follows: "I asked him to give me a mortgage on the machine; he said he did not care to do so, but I insisted and told him I did not consider myself safe the way things stood, and that I wanted further security, and wanted him to give me a mortgage on the machine. He hesitated, as it seemed, whether to do so or not, but finally concluded to do so. I then asked him if there were any notes or writings drawn up about the machine. He said there were not that he knew of. I then asked, 'Has any one got any hold or claim on this machine?' and he said 'No.' I had heard statements in the neighborhood that the machine was Kingsland, Ferguson & Co.'s."

It is further shown by the evidence of this witness that after Eisenberg's death he administered on his estate, and sold all the personal property mentioned in the deed of trust to pay the debts mentioned therein, that the proceeds

of the sale paid all but \$406, with \$100 of sale money to be collected and applied, thus reducing the amount to \$306; that the forty-one acres of land, the homestead of Eisenberg, presumably not subject to sale under the judgment referred to in his evidence, was worth from \$8 to \$20 per acre. That thus secured, he called on Eisenberg for a mortgage on the machine, knowing that Eisenberg was insolvent, and that he had bought said property of plaintiffs on time, and that it was not paid for, and that he heard in the neighborhood that the machine was Kingsland, Ferguson & Co.'s. Under the rule laid down in the case of Speck v. Riggin, 40 Mo. 405, where it is said "that notice is either where the purchaser knows of the existence of the adverse claim, or is conscious of having the means of knowing," we think defendant is chargeable with notice, he having admitted in his evidence that "he did not know whose machine it was at the time he took the mortgage;" that he had heard statements in the neighborhood that it was plaintiffs. See, also, Ringo v. Richardson, 53 Mo. 393; Musick v. Barney, 49 Mo. 458; Meier v. Blume, ante, p. 179. While the evidence of Drum shows some contradictions, the judge who heard the evidence and saw the witness was in a better situation to judge of the weight to be attached to it than we are.

On the whole record, we think the judgment was for the right party, and, therefore, affirm it. All concur.

Mansur v. Botts, Appellant.

- 1. Pleading; SPECIAL CONTRACT: COMMON COUNTS: CODE. Where a special contract has been fully executed, and nothing remains to be done but to pay the stipulated sum of money due thereon, the common counts in indebitatus assumpsit will lie to recover the same. This was the rule at common law, and it has not been changed by the code.
- 2. Evidence: SPECIAL CONTRACT: AMOUNT OF RECOVERY. But the

plaintiff having introduced the special contract in evidence, is limited in his recovery to the sum specified therein, although in his petition he declared on a quantum meruit.

Practice, Civil: INSTRUCTIONS. Instructions should be predicated
on the whole evidence, and present, for the consideration of the
jury, the different aspects of the questions at issue, as shown by the
pleadings and evidence.

Appeal from Linn Circuit Court. - Hon. C. Boardman, Special Judge.

REVERSED.

L. T. Collier for appellant.

As the plaintiff (respondent here) sues upon an account and seeks to recover as upon a quantum meruit, for his legal services rendered in the suits mentioned in his petition, the court erred in permitting respondent to introduce evidence tending to show a special contract fixing his compensation for said services in the two suits against the sheriffs of Linn county, for the following reasons:

1. Because the special contract disclosed by the testimony constitutes a different cause of action from that alleged in the petition, and requires other and different proof to sustain the same. 2. Because said testimony in relation to a special contract, was in contradiction of the allegations of the petition, and set up a new and distinct cause of action. 3. Because said testimony as to a special contract tended to mislead the jury as to the real issues in the cause, and to exert an improper influence upon them in making up their verdict. In support of the proposition here laid down, appellant cites the following authorities: Stollings v. Sappington, 8 Mo. 119, and authorities therein cited; Chambers v. King, 8 Mo. 319; Butcher v. Death, 15 Mo. 275; Link v. Vaughan, 17 Mo. 586; Duncan v. Fisher, 18 Mo. 403; Beck v. Ferrara, 19 Mo. 30; Pultis v. Sims, 34 Mo. 249; Bank v. Armstrong, 62 Mo. 65; Boone v. Stover, 66 Mo. 436; Lampkin v. Collier, 69 Mo. 173; Carson v. Cummings,

69 Mo. 332; Faulkner v. Faulkner, 73 Mo. 335. The court erred in giving instructions numbered three and four, asked by respondent, and in refusing to give number seven for appellant.

A. W. Mullins for respondent.

The lower court did not err in admitting the evidence of the plaintiff with respect to a special contract between him and defendant, for the compensation plaintiff was to receive for his services in the two sheriff cases, nor in refusing defendant's demurrer to the evidence, at the close of plaint-Stout v. St. Louis Tribune Co., 52 Mo. 342; iff's testimony. Yeats v. Ballentine, 56 Mo. 530; Eyerman v. Mt. Sinai, etc., 61 Mo. 489; Davis v. Brown, 67 Mo. 313; Dutro v. Walter, 31 Mo. 516; Wood on Master and Servant, pp. 352, 353, 355; Dermott v. Jones, 2 Wall. 1; Chesapeake & Ohio, etc., v. Knapp, 9 Pet. 541; 2 Smith L. C., top pp. 23, 38, 39, 44; Felton v. Dickinson, 10 Mass. 287; Knight v. Co., 2 Cush. 271: Kelley v. Phelps, 57 Wis. 425. Plaintiff was entitled to recover for his services upon a quantum meruit, notwithstanding the cases resulted unfavorably to Botts. Wood on Master and Servant, pp. 352, 353; Rose v. Speise, 44 Mo. The court committed no error in refusing appellant's instruction number seven, as there was no evidence to base The amount found by plaintiff fell below the sum to which he would have been entitled, had the special contract been taken as a basis with respect to the sheriff cases Upon the whole record, the judgment is right and should be affirmed.

PHILIPS, C.—This is an action in assumpsit by plaintiff, Mansur, to recover for services as an attorney at law rendered by him to defendant, in three suits in the Linn circuit court. The action is in form as for a quantum meruit, accompanied with an itemized account.

The answer, after denying the allegations of the peti-

tion, except as thereinafter admitted, avers that the suits for which plaintiff sues for services, were brought at the instance of plaintiff, and that he agreed to attend to the same, as an attorney, on condition that, if he did not succeed in realizing the money sought to be recovered in some one of them, he would not charge the plaintiff anything for his services. That the plaintiff failed to recover judgment in either of the said cases. It is then further alleged that the failure therein was occasioned by the default, negligence and unskillfulness of plaintiff as such attorney. By way of counter-claim, the defendant asked judgment against plaintiff on a note executed by plaintiff to defendant, dated August 14th, 1875, for \$104.90, with ten per cent interest thereon from date, to be compounded if not paid annually. The reply was a general denial of all the allegations of the answer.

On the trial of the cause before a jury, the plaintiff, against the objection of the defendant, was permitted to testify to a special contract in respect of his services in two of said actions. As to one of said suits the plaintiff's testimony tended to show that he attended to it at the request of defendant, without any stipulation as to the amount of his fee. Plaintiff gave evidence as to the reasonable value of his services in all of the cases.

The defendant, at the close of plaintiff's case, asked the court to instruct the jury as follows: "It appearing from the testimony of the plaintiff that there was a special contract between plaintiff and defendant, as to compensation for plaintiff's services in the two suits brought against Brott and Chesround, and this suit being brought on account, or quantum meruit, the plaintiff cannot recover in this action as to said two suits." The court refused to so instruct the jury, and the defendant excepted. The defendant's evidence tended to support the issues tendered in the answer. The note executed to him by defendant, set up as a counter-claim, was read in evidence, and corresponded with the plea. The jury found for the plaintiff in the sum

of \$50, in addition to the amount of the note due from plaintiff to defendant, for which judgment was accordingly rendered. Defendant has brought the case here on appeal.

The principal question discussed by counsel in their briefs is, as to whether the court erred in permitting proof by plaintiff of the special contract. Defendant contends that it was a clear departure from the issues tendered in the pleadings; that the action being on an account, as for a quantum meruit, it, in effect, said there was no special contract as to any part of the services rendered. It is a rule of the common law long established, that indebitatus assumpsit will lie to recover the stipulated price due on a special contract, where the contract has been fully executed, and it is not necessary in such case to declare upon the special contract. Bank of Columbia v. Patterson, 7 Cranch 333. In Chesapeake & O. C. Co. v. Knapp, 9 Pet, 565, Mr. Justice McLean very succinctly stated the rule thus: "There can be no doubt that where the special contract remains open the plaintiff's remedy is on the contract, and he must set it forth specially in his declaration. But if the contract has been put an end to, the action for money had and received lies to recover any payment that has been made under it. But if the contract remain open. the plaintiff's demand for damages arises out of it, and then he must state the special contract, and the breach of it. It is a well settled principle, where a special contract has been performed, that a plaintiff may recover on the general counts." So in Dermott v. Jones, 2 Wall. 9, Mr. Justice Swayne says: "While a special contract remains executory, the plaintiff must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue on the contract, or in indebitatus assumpsit, and rely upon the common counts. In either case the contract will determine the rights of the parties." This may be considered as the generally accepted doctrine. Felton v. Dickinson, 10 Mass. 292; Knight v. New Eng. W. Co., 2 Cush. 271. Nor can it be

maintained, as suggested, that there is anything in the provisions of our code of practice which renders the rule inapplicable in this State. For in Stout v. St. Louis Tribune Co., 52 Mo. 347, this court declared the common law rule in all its force, as above stated. This point is, therefore, ruled

against the appellant.

- But, the plaintiff having introduced in evidence the special contract, he was clearly, as to the fee for the two cases named in the special contract, limited in his recovery to the sum specified therein. His evidence as to this matter was, that the defendant requested him to bring the two suits against Brott and Chesround, and if plaintiff did not bring them he must pay the note mentioned in the answer: that being hard run, he consented that if he (defendant) would get some local attorney in Linneus to assist, he would bring the suits and attend to them, provided the defendant would surrender to him his note and pay his expenses; that defendant so agreed, and plaintiff rendered the services in said two cases accordingly. The evidence indicates that the local counsel assisted on defendant's behalf at his instance. But the trouble arises on the instruction asked by plaintiff and conceded by the court. It is as follows:
- 1. If the jury believe from the evidence that the plaintiff rendered the services for the defendant, as claimed in the petition, and at his request, then the jury should allow plaintiff the reasonable value of his said services, as shown by the evidence, and if such amount so found to be due to plaintiff exceeds the amount due on the note due from the plaintiff to defendant, and filed with defendant's answer, the jury should make their verdict in favor of plaintiff for such balance.

From which it is manifest the plaintiff, notwithstanding his own evidence, proceeded as for a quantum meruit, regardless of the designated consideration for the services in the two suits. On plaintiff's evidence, pressed by him

before the jury, the limit of his recovery for services in two of the suits was the amount of the note held by defendant against him, and plaintiff's expenses. It is true, that in a succeeding instruction, the jury, on plaintiff's request, were instructed that if "there was no certain fee agreed on, then plaintiff was entitled to a reasonable compensation." But it is impossible to say which of the two facts in dispute the jury found for the plaintiff. If they found there was no contract whatever, except such as the law implies, where one person at another's request renders him service without any stipulated sum therefor, then the question might arise whether the finding was not contrary to all the evidence, and in spite of the evidence of both parties. the plaintiff swore to a special contract, a stipulated sum. and the defendant swore he was to pay nothing. It is suggested by plaintiff's counsel, as if apprehensive of error in this particular, that no harm was done to the defendant, as the sum found above the amount owing by plaintiff to the defendant was only \$50; whereas the evidence showed the value of plaintiff's service in the third suit to be reasonably \$100. We have, in our desire to do no injustice, and to avoid the necessity of a new trial, to either party's detriment, carefully considered this argument. But we are bound by the record before us. The field of conjecture is forbidden to us. Plaintiff examined only two witnesses. One placed the sum of \$75 on the plaintiff's services for each of the two cases against the sheriffs, Brott and Chesround, and \$100 on the third suit, while the other witness fixed a sum of \$250 in gross on all the cases. How much, therefore, the jury found the value of plaintiff's services in each of the cases, is impossible of ascertainment. They evidently fixed upon a sum less than that stated by the witnesses. If it be argued that they found the special contract to have been made, and, therefore, allowed the plaintiff the \$50 on account of the third suit, how is the conclusion to be maintained, in view of the fact that the undisputed evidence was, that the service in the third suit was worth one-

half more than in either of the other two? The jury accredited under that theory the single evidence of the plaintiff in finding the existence of the special contract, while they, regardless of the evidence of all the witnesses, fixed the sum at just one-half for the services in the third suit. It may have been a compromise verdict, which, unfortunately for the sanctity of the jurors' obligations, too frequently, perhaps, occurs. Be the truth as it may, it is impossible for the court to ascertain, with any judicial reliance, the theory on which the jury reached its conclusion. In such conjecture the only guide for the court is to determine whether the law was properly declared by the trial court to the jury.

Instructions should be predicated on the whole evidence, and present, for the consideration of the jury, the different aspects of the questions at issue, as shown by the pleadings and evidence. The plaintiff claimed, under his testimony, that there was a special contract as to the fees in two cases, and as to the third he claimed as for a quantum meruit; while the defendant denied the special contract, or that he was to pay anything. The plaintiff's instructions should, at least, have covered both questions based on his own evidence, and expressly limited the jury in their finding, on the first issue, to the amount of the note. Sigerson v. Pomeroy, 13 Mo. 620; Mead v. Brotherton, 30 Mo. 201; Clark v. Hammerle, 27 Mo. 70; Fitzgerald v. Hayward, 50 An instruction is equally faulty whether it Mo. 516. enlarges or restricts the issues. Iron Mt. Bank v. Murdock. 62 Mo. 70.

It follows that the judgment of the circuit court must be reversed and the cause remanded. All concur. Harding v. The Chicago & Alton Railroad Company.

HARDING, Appellant, v. The Chicago & Alton Railroad Company, Garnishee of Lacey.

Justices of the Peace: APPEAL: CORPORATIONS: RESIDENCE. A corporation, although chartered in another state, which keeps in this State an office or agent for the transaction of its usual and customary business, has a legal residence here in the county of such office or agent, and must prosecute its appeals from the judgment of a justice of the peace within ten days after rendition thereof.

Appeal from Jackson Special Law and Equity Court.—Hon. R. E. Cowan, Judge.

REVERSED.

Henry Smith for appellant.

Ten days only are allowed for a resident of the county to appeal from a justice of the peace. 2 Wag. Stat. 847. The service was on the railroad's chief officer, at his office in Jackson county, and was sufficient. 1 Wag. Stat., p. 294, §§ 26, 28; Slavens v. Railroad Co., 51 Mo. 308; Dixon v. Railroad Co., 31 Mo. 409; St. Louis v. Wiggins Ferry Co., 40 Mo. 580; Laws 1873, p. 58; R. S. 1879, § 2521. The garnishee, although chartered in Illinois, having an office and place of business in this State, was subject to suit in same manner as railroad corporations chartered by this State. Laws 1877, p. 369; McAllister v. Ins. Co., 28 Mo. 214; City of St. Louis v. Wiggins Ferry Co., 40 Mo. 580; Baldwin v. Railroad Co., 5 Iowa 518; U. S. B'k v. Devaux, 5 Cranch 84; Slavens v. Railroad Co., 51 Mo. 308. When a corporation has its chief office or place of business here, it is a resident within the meaning of the law. 2 Wag. Stat., 1006, § 2; 1 Wag. Stat., 292, § 19; Farnsworth v. Railroad Co., 29 Mo. 75; Robb v. Railroad Co., 47 Mo. 540; Middough v. Railroad Co., 51 Mo. 520.

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Harding v. The Chicago & Alton Railroad Company.

Gates & Wallace for respondent.

The respondent, the Chicago & Alton Railroad Company, was not a resident of this State, and, therefore, had twenty days within which to appeal from the judgment of the justice. 2 Wag. Stat., p. 847, § 3; R. S. 1879, § 3041; City of St. Louis v. Wiggins Ferry Co., 40 Mo. 586; Robb v. Chicago & Alton R. R. Co., 47 Mo. 541; Herryford v. Ins. Co., 42 Mo. 148.

Ewing, C.—Appellant sued Lacey, and summoned the Chicago & Alton Railroad Company, as garnishee, before a justice of the peace, where there was judgment for plaintiff, from which the garnishee appealed to the special law and equity court, where appellant, Harding, moved to dismiss the appeal because the garnishee was a resident of Jackson county, and did not take the appeal within ten days, as provided by Wagner's Statutes, page 847, section 3, then in force. That motion to dismiss appeal was submitted to that court on the following agreed statement of facts:

"At the time of service of garnishment on defendant, and at the time the appeal was taken from the justice, defendant was a corporation, organized under the laws of the state of Illinois, and its general office in Chicago, Illinois; that Wm. II. Reed was general western agent of defendant, and his office, as such, was then at the corner of Fourth and Main streets, in Kansas City, Jackson county, Missouri, and he a resident of said city; that he, as such agent, was transacting defendant's business at that place, soliciting freight for defendant's road, and representing the road in various ways, and for such service was paid a regular salary by defendant; that defendant, at the time of the suit before the justice and the appeal from his decision, owned and operated a line of railroad in Missouri, extending from Louisiana to Mexico, Missouri, which has since said appeal been extended, and is now operated to Kansas City, Missouri; that defendant was served with garnishment by conHarding v. The Chicago & Alton Railroad Company.

stable, October 3rd, 1878, in Jackson county, Missouri, by notice thereof to said W. H. Reed, as its general agent and chief officer in Missouri, and that in obedience thereto defendant appeared before the justice and filed its answer."

March 15th, 1880, the court overruled plaintiff's motion to dismiss appeal, and plaintiff failing to further prosecute the case, dismissed his suit, and rendered judgment against plaintiff for all costs. From that judgment, after usual motions for new trial and 'n arrest, plaintiff prosecuted

this appeal.

The only question, therefore, to consider is, was the garnishee a resident of Jackson county, within the meaning of the law. The respondent cites, as authority in its favor, City of St. Louis v. Wiggins Ferry Co., 40 Mo. 581, from which he quotes to sustain the position that the garnishee is not a resident of this State, etc., but the quotation does not go far enough. In that case Judge Holmes says: "This doctrine is in general confined to the territorial limits of the state from which the corporation derives its charter; but however it might be on general principles only, there can be little doubt that the effect of the statutes of this State is such as to make this corporation, though chartered abroad, a resident of this State, not only for the purpose of suing and being sued by ordinary process, or by attachment, but for all the purposes of ownership," etc.

In Baldwin v. M. & M. R. R. Co., 5 Iowa 518, the court says: "This corporation has a legal residence in any county in which it operates the road, or exercises corporate powers or privileges." Other authorities sustain a similar view of the question. Bristol v. C. & A. R. R. Co., 15 Ill. 436; Dixon v. H. & St. J. R. R. Co., 31 Mo. 409; Slavens v. South Pacific R'y Co., 51 Mo. 308; Wag. Stat., 294, §§ 26, 28; Ib., 847, § 3; McNichol v. U. S. M. R. Agency, 74 Mo. 457. The agreed statement of facts shows that the garnishee kept "an office or agent for the transaction of their usual and customary business," etc. This was an exercise of "corporate powers and privileges" within the meaning

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of the law, and which creates the "legal residence" for the purpose of conferring jurisdiction.

The judgment of the court below is reversed, and the cause remanded to the circuit court of Jackson county, with instructions to dismiss the respondent's appeal from the justice of the peace. Philips, C., concurs: Martin, C., and Sherwood, J., absent.

WATSON V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Railroads: KILLING STOCK: SUFFICIENCY OF COMPLAINT. Jackson v. St. Louis, Iron Mountain & Southern R'y Co., ante, p. 147, followed and re-affirmed.

Appeal from Buchanan Circuit Court.—Trial before Hon. H. S. Kelley, Judge of the Twenty-ninth Judicial Circuit.

AFFIRMED.

M. A. Low for appellant.

The petition does not state facts sufficient to constitute a cause of action. Rowland v. Railroad Co., 76 Mo. 619; Railroad Co. v. Bishop, 29 Ind. 202; Railroad Co. v. Robinson, 35 Ind. 380; Cunningham v. Railroad Co., 70 Mo. 202; Field v. Railroad Co., 76 Mo. 614; Gautlet v. Egerton, L. R., 2 C. P. 371.

S. B. Green and Thomas F. Ryan for respondent.

Philips, C.—This is an action, instituted in the Buchanan circuit court to recover damages, based on the following petition:

"Plaintiff, for cause of action, states that the defendant

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is a corporation duly incorporated and organized under the laws of the state of Illinois, and that on the 15th day of July, 1879, and for some time prior thereto, it was in the possession, control and occupancy of a certain railroad in the State of Missouri that is known as the Chicago & South-Western Railroad; running through the counties of Platte. Clinton and Buchanan, in the State of Missouri, and was operating said railroad with its cars and locomotives on the said 15th day of July, 1879. That said railroad runs along and through the north side of a part of the southeast quarter of section 16, township 55, range 37, in Rush township, Buchanan county, Missouri. That the plaintiff, on the said 15th day of July, 1879, was the owner of the said part of the north half of the southeast quarter of section 16, township 55, range 37, in said county and State aforesaid; and that he was cultivating said land at said time, and had grown thereon crops of wheat, oats and corn; that said wheat and oats were harvested and in the shock. the said 15th day of July, 1879, and at different times prior thereto, certain hogs went upon defendant's said railroad track, (which defendant was operating and had control of as aforesaid,) and strayed therefrom in and upon said land of plaintiff, and destroyed plaintiff's wheat, corn and oats. That plaintiff had destroyed by said hogs which so went upon defendant's railroad track and so strayed therefrom on to plaintiff's land, 100 bushels of wheat, worth at its market value, \$1 per bushel; fifty bushels of corn, worth at its market value, thirty-five cents per bushel, and oats of the value of \$5; and that plaintiff has been damaged by reason thereof in the sum of \$122.50.

Plaintiff states that said hogs went upon said railroad track at a point on said railroad where said railroad track enters the land of plaintiff, heretofore described, and where the same was not inclosed by a lawful fence, and where there were not sufficient cattle-guards to prevent said hogs from going upon defendant's said railroad track, and strayed therefrom upon the said land of plaintiff. Plaintiff states

that by reason of the failure of the defendant to construct and maintain sufficient fences and cattle-guards to prevent said hogs from going upon the track of defendant and straying therefrom upon the plaintiff's lands, he has been damaged, as aforesaid, in the sum of \$122.50. Plaintiff says that by virtue of section 43, article 2 of chapter 37 of Wagner's Statutes of the State of Missouri, and the amendments thereto, plaintiff is entitled to recover of defendant double the amount of damages which he has sustained. Wherefore plaintiff prays judgment for the sum of \$255, and costs."

The answer was a general denial. Verdict and judgment for plaintiff, from which the defendant, after an unsuccessful motion in arrest of judgment, has appealed to this court.

The matter relied on for a reversal of the judgment below, is the alleged insufficiency of the petition. It is rendered unnecessary to review the objections made against the petition, for the reason that they fall within the principles considered and determined in the case of Jackson r. St. Louis, Iron Mountain & Southern Ry Co., ante, p. 147, and the authorities therein cited.

Tested by the principles therein settled, the judgment of the circuit court must be affirmed. All concur.

Tenny's Administrator v. Lasley's Administrators, Appellants.

- Administration: Limitations. Under the Administration Law, (R. S. 1879, § 189,) if no cause of action has accrued or exists in favor of the claimant upon his contract or claim when the two years' limitation begins to run, it is not a demand against the estate, within the meaning of the statute, and the limitation does not begin to run before the cause of action has accrued.
- 2. : ALLOWANCE OF DEMANDS NOT DUE. Revised Statutes 1879,

sections 205, 206 of the Administration Law, relating to demands not due, contemplate demands existing in favor of a person in being, in whose favor a judgment may be rendered upon the demands prior to the maturity of the same, and refer to demands with some fixed or certain date of maturity, so as to admit of the rebate of six per cent from the date of judgment till the date of maturity.

Appeal from Cass Circuit Court.—Hon. Noah M. GIVAN, Judge.

AFFIRMED.

W. J. Terrell for appellants.

The court erred in admitting the notes as evidence, unless sections 205, 206, Revised Statutes, gave a right of action. If right of action at time of presentation was given by these sections, or either of them, such right existed when letters were granted, and was barred by special limitation of two years. R. S., § 189. There is no exception mentioned in this special statute of limitations that admits these demands. R. S., §§ 185, 188, 189; Richardson v. Harrison, 36 Mo. 96; Greenabaum v. Elliott, 60 Mo. 25; Spaulding v. Suss, 4 Mo. App. 541. Each of these notes, by its terms, is payable to "the said Jonathan Tenny's heirs, administrators or assigns," and there was, during all the years of administration of the estate, a legal holder of said notes, and administration could have been had at any time within the two years before the special bar was interposed by our statute concerning administration of estates, and that is one of the steps incumbent upon the foreign creditor. Presentation of a demand in the proper court has been held good when there was no person that could be sued. Williamson v. Anthony, 47 Mo. 299; Tynan v. Walker, 35 Cal. 635. Payment by administrator, if good to prevent bar of general statute of limitation, is entirely irrelevant here, as the administrators can only waive notice for allowance and classification, and cannot waive allowance or classification. Again,

payment is not even waiver of notice. Spaulding v. Suss, 4 Mo. App. 542.

Railey & Burney and Boggess & Moore for respondent.

Jonathan Tenny and wife, having died in Ohio, Tate, the administrator of Jonathan there, could not maintain an action, or have said claims allowed in this State. Mc-Carty v. Hall, 13 Mo. 480; Naylor v. Moffat, 29 Mo. 126; In Matter of Part. Est. of Henry Ames & Co., 52 Mo. 293; Minor v. Cardwell, 37 M. 350; Goodwin v. Jones, 3 Mass. 514; Hobart v. Conn. Turnpike Co., 15 Conn. 145. No person was authorized to sue upon or have said demands allowed in this State, until plaintiff was appointed administrator in April, 1880. The statute of limitations did not, therefore, commence running against said claims until said date. Polk v. Allen, 19 Mo. 468; Dillon v. Bates, 39 Mo. 292; Reilly v. Chougutte, 18 Mo. 220; Wood on Limitation of Actions, p. 254, § 117, and cases cited; Angell on Limitations, §§ 54, 55, and cases cited; Hobart v. Conn. Turnpike Co., 15 Conn. 145, 147, 148, and cases cited; Sherman v. Western Stage Co., 24 Iowa 515, 553; Sanford v. Sanford, 62 N. Y. Ct. App. 554, 555; Geiger v. Brown, 4 McCord (S. C.) 423; Lee v. Gause, 2 Ired. (N. C.) L. 440; Bucklin v. Ford, 5 Barb. (N. Y.) 393; Davis v. Gurr, 6 N. Y. Ct. App. 124; Thurman v. Shelton, 10 Yerg. (Tenn.) 383; Clark v. Hardinan, 2 Leigh. (Va.) 347; Levering v. Rittinhouse, 4 Whar. (Pa.) 130; Conyers v. Keenan, 1 Kelley (Ga.) 379; Briggs v. Thomas, 32 Vt. (3 Shaw.) 176; Wyatt v. Rambo, 29 Ala. 510; Murray v. East India Co., 5 Barn. & Ald. 204. The notes in controversy were not collectible by law, until after the death of both Jonathan and Mariah Tenny; and as the latter did not die till January 1st, 1880, no right of action accrued on said notes until said date; hence, the statute did not commence running prior thereto. Miller v. Woodward & Thornton, 8 Mo. 169; Finney v. State to use of Estiss, 9 Mo. 227; Chambers v. Smith, 23 Mo. 174; Burton

v. Rutherford, 49 Mo. 255; Sherman v. Western Stage Co., 24 Iowa 515, 550; Singleton v. Townsend, 45 Mo. 379, and cases cited; Jameson v. Jameson, 72 Mo. 640.

Martin, C.—This was an action brought in the probate court for the purpose of obtaining allowance of the demands against the estate of Mathew Lasley, in the form of promissory notes. The probate court refused to allow them. On appeal the circuit court allowed them in the sum total of \$1,523.84, from which action the defendants appeal to this court. Inasmuch as the defense springs from the unusual character of the demands, I will set them out in 'ull as follows:

"\$1,000. Two years after the death of Jonathan Tenny and Mariah Tenny, wife of said Jonathan Tenny, value received, we promise to pay to the said Jonathan Tenny's heirs, administrators or assigns, \$1,000, with interest from date, payable annually.

September 22nd, 1862.

MATHEW LASLEY, JON. H. LASLEY, W. H. LASLEY, Security."

"\$1,000. Three years after the death of Jonathan Tenny and his wife, Mariah Tenny, value received, we promise to pay Jonathan Tenny's heirs, administrators or assigns, \$1,000, with interest from date, payable annually.

September 22nd, 1862.

Mathew Lasley, Jon. H. Lasley, W. H. Lasley, Security."

The interest on these notes was paid to Jonathan Tenny up to 1876, at irregular intervals and was indorsed on the same. The only defense interposed consists of the limitation of the two years within which demands against the estate of a deceased person must be presented for allowance. It appears, from the admission of the parties, that due notice of the issue of letters of administration on the estate of Mathew Lasley, was published for four weeks con-

secutively, the first insertion being on the 12th of April, 1877. These notes were not presented to Lasley's administrators until the 12th day of April, 1880; the bar of the statute had at that time become absolute if the demands, as presented, fall within its terms and effect.

The facts upon which the plaintiff relies to overcome the defense of the statutory bar of the administration act, are as follows: That Mariah Tenny died in 1876, and Jonathan Tenny on January 1st, 1880, both being at the time of death residents of Ohio; that administration on the estate of Jonathan Tenny was first taken out on the 12th day of February, 1880, by the public administrator of Cass County, who is the plaintiff in this case, and by whom the notes were presented for allowance on the 12th day of April, 1880.

I am persuaded that these facts overcome the bar of the statute. Section 189, (R. S. 1879,) declares that all demands not thus exhibited in two years, shall be forever barred, saving exceptions as to persons under disability. If, when the two years' limitation begins, no cause of action has accrued or exists in favor of the claimant upon his contract or claim, it is clearly not a demand against the estate, ' within the meaning of the statute, as defined in this section. When the administration of defendant was published in April, 1877, the cause of action arising on these notes and finally enforced by judgment of court, had not accrued. It could not accrue prior to the death of Jonathan Tenny in January, 1880. No suit before that time could be brought on the notes in favor of any one, because they were not payable before the death of Mrs. Tenny and Mr. Tenny. According to all authorities, the limitation does not begin to run before the cause of action has accrued. It is not a demand before that time. Miller v. Woodward & Thornton, 8 Mo. 169; Finney v. State to use of Estiss, 9 Mo. 227; Chambers v. Smith, 23 Mo. 174; Burton v. Rutherford, 49 Mo. 255; Singleton v. Townsend, 45 Mo. 379; Jameson v. Jameson, 72 Mo. 640. The demand on these notes was

similar to that which arises from an obligation to pay money to one's heirs, which does not accrue until the heirs are in being, (State v. Peacock, 45 Mo. 263;) or upon a covenant which does not accrue till condition broken. Jonathan Tenny could not sue, because the money was not payable in his lifetime, and his assignee stood in no better attitude.

It is contended by defendant that these demands, although not due, could have been presented for allowance and adjusted under sections 205 and 206, which relate to the allowance of demands not due. These two sections appeared first in our administration law in the revision of 1. R. S. 1855, p. 156. They evidently contemplated a demand existing in favor of a person in being, in whose favor a judgment may be rendered upon the demand prior to the maturity of the same. It would seem, also, that they refer to demands with some fixed or certain date of maturity, so as to admit of the rebate of six per cent from the date of judgment till the date of maturity. The demands of the notes in suit do not, in my opinion, fall within the exceptions contained in sections 205 and 206; first, because, until the death of Mr. and Mrs. Tenny, there was no one in being to present the demands, and no one to agree upon the rebate of the statute, or to accept a judgment of adjustment of them under the provisions thereof; second, because the decease of Mr. and Mrs. Tenny being uncertain events, the basis of the rebate of the statute was wanting. The notes being payable, one in two years and the other in three years after the death of Mr. and Mrs. Tenny, it was competent for the court, after these events had happened, to adjust the demands under sections 205 and 206, for the party owning the demands was in court, or could be there, and the time which the demands had to run to reach maturity, was fixed and certain.

The judgment of the circuit court having been in accordance with the views herein expressed, it is affirmed. All concur.

ATKISON, Appellant, v. HENRY.

- Land Title, Legal, Equitable: NOTICE: ADMINISTRATION. Where
 one acquires the legal title to land with notice of some equitable
 right of another therein, such equitable right so held by such other
 person is an interest in the land, which can be sold and transferred
 by his administrator.
- 2. Ejectment: Possession: MESNE PROFITS. Both at common law and under statutes regulating the action of ejectment and allowing a recovery therein for waste and injury and mesne profits, the plaintiff must first establish his right to the possession during the period for which he claims rents and profits, before he can recover them for such period.
- 3. Judgment, Recovery of Damages paid Under. Recovery cannot be had by plaintiff, against defendant, for damages paid by him to defendant, under a judgment against plaintiff and in favor of defendant, nor for attorney's fees and costs incurred by plaintiff in the suit, so long as such judgment stands unreversed.

Appeal from Bates Circuit Court.—Hon. F. P. Wright, Judge.

AFFIRMED.

E. J. Smith, W. S. Shirk and C. C. Bassett for appellant.

We suppose the demurrer was sustained on the ground that plaintiff might have, in the former suit, set up the same matters herein sued for and recovered for them, and that having failed to do so, he is now estopped from suing in this action. This position is not correct. Under the practice before the code he could not have set it up or recovered for the same in that action. Neither could he under the earlier cases in this State under the code. Peyton v. Rose, 41 Mo. 257; Curd v. Lackland, 43 Mo. 139, and other cases before and after those. While now it may be that under Henderson v. Dickey, 50 Mo. 161, and Duval v. Tinsley, 54 Mo. 93, plaintiff might have included in that suit the matters here sued for, he was not bound to do so.

There is nothing in any of these cases that requires him to do so, or be estopped from afterward suing for the same. And he is not estopped. See Bigelow on Estop., pp. 96 to 112, and cases there cited. Indeed, if these matters had been an issue in the former suit, we might have shown that no evidence of, or as to them, was introduced on that trial, and still have maintained this action, as was ruled in *Hickerson v. City of Mexico*, 58 Mo. 61, and *Sweet v. Maupin*, 65 Mo. 65.

A. Henry pro se.

The demurrer is based on the ground that there is no cause of action stated in the petition. The judgments in these cases are final between the parties, and binding until set aside by direct proceedings instituted for that purpose. Plaintiff bought the land at administrator's sale, when the legal title was in defendant, and alleged to be held fraud-The general charge of fraud in the petition, was but the conclusion of the pleader, and was not sufficient. But if defendant, in fact, held the title fraudulently, it would not be void but voidable, and the right to avoid it is not transferable. Crocker v. Balangee, 6 Wis, 645; 20 Wis. 183; French v. Shotwell, 5 John. Ch. 555; Graham v. Railroad Co., 12 Otto 148. The deceased had no interest in the land that could be sold by the administrator. George v. Williamson, 26 Mo. 192. The sale under the order of the county court conveyed no title. Criddle v. Criddle, 21 Mo. 522; Brown v. Finly, 18 Mo. 375; McLaughlin v. McLaughlin, 16 Mo. 242; Lake v. Meier, 42 Mo. 389. The matters alleged in the petition are res judicata. Stout v. Lyle, 13 Otto 66; Peck v. Jones, 7 How. 612. Where suit is brought and dismissed upon final hearing, it cannot be maintained again, although there were other matters alleged in it. Case v. Beauregard, 101 U.S. 688; Wickersham v. Whedon, 33 Mo. 561; McDaniel v. Lee, 37 Mo. 204. Judgment for part of a claim will bar recovery in another suit. Corby v.

Taylor, 35 Mo. 447. Where a party fails to make any defense that he might make, he will be barred in another case from making the same. Greenabaum v. Elliott, 60 Mo. 25; Moran v. Plankington, 64 Mo. 337.

Hough, C. J.—The petition in this case alleges, in substance, that on the 4th day of November, 1868, the plaintiff bought, at a sale made by the administrator of one Thomas Starnes, deceased, the equitable right of said Starnes in and to certain land in Bates county, the legal title to which was, at the time, held by the defendant, and is alleged to have been obtained by him in fraud of the rights of said That plaintiff, after his said purchase, entered into possession of said land, inclosed the same with a fence, and planted an orchard thereon. In the year 1869 the defendant sued for and recovered from the plaintiff possession of said premises, together with the sum of \$100 as damages for the use and occupation thereof, which sum was paid by plaintiff, and possession of said premises was surrendered to defendant, who removed the fence and destroyed the orchard. Thereafter, the plaintiff instituted suit against the defendant to divest him of the legal title to said land, and invest himself therewith, and, after being twice compelled to suffer a nonsuit, finally prevailed, and in 1878 recovered judgment as prayed in his petition; but the plaintiff avers the defendant still remains in possession of the land. In that suit no claim for damages, or for rents and profits, appears to have been made. Plaintiff alleges that by reason of the facts aforesaid, the defendant has become liable to pay to him the following sums of money, to-wit:

November, 1869.

For damage recovered off of plaintiff by defendant	
in the judgment ousting plaintiff from the land\$	100
Costs of said case paid by plaintiff	50
Plaintiff's time and attorney's fees in that case	50
Fence taken and removed by defendant	100

100
500

stained

The defendant filed a demurrer, which was sustained on the ground that the petition failed to state a cause of action.

The first point made by the defendant in support of the judgment of the court below is, that conceding he had acquired the legal title in fraud of the rights of the decedent, Starnes, the right to avoid such fraudulent conveyance could not be sold at administration sale, and, therefore, the plaintiff acquired nothing by his purchase, has no interest in the land, and no right to maintain any action based upon the supposed acquisition of any interest therein; and to sustain this proposition the plaintiff cites, in connection with other cases, the case of George v. Williamson, 26 Mo. 192. In view of other allegations in the petition, we conceive this question to be unimportant, but as the point has been argued, we will notice it.

In the case cited, the conveyance was made by the decedent, in fraud of creditors, and this court held that such a conveyance was binding on the decedent and his heirs, and could only be annulled at the suit of creditors. That neither the administrator nor the heirs could set it aside; that the land conveyed constituted no part of the estate of the decedent, and that he had no interest therein, subject to sale by the administrator. That case, which was followed in Jackman v. Robinson, 64 Mo. 289, and has been recognized in other cases, is not at all analogous to the case before us. Here the title acquired by the defendant does not appear to have been acquired from Starnes in fraud of the creditors of Starnes, nor to have been acquired from Starnes through any fraud practiced upon him, but to have been acquired from some other source not named, in fraud

of the rights of Starnes. Had the title been fraudulently acquired from Starnes, it is doubtful whether his right to set the conveyance aside, for fraud practiced upon him, could have been transferred to the plaintiff by administration sale. Graham v. Railroad Co., 102 U. S. 148; Crocker v. Bellangee, 6 Wis. 645. It is fairly inferable from the allegations of the petition, that the defendant acquired the legal title with knowledge or notice of some equitable right of Starnes to the land, and such a right, so held by Starnes, was an interest in land which could be sold and transferred by the administrator.

Besides, the plaintiff alleges that by the decree of a court of competent jurisdiction, he had been invested with the legal title held by the defendant. It does not appear, however, that in the suit for title any writ of possession was prayed for, or issued, and we are warranted in drawing an inference to the contrary, as it is averred that the defendant is still in possession. Nor does it appear that any action of ejectment, based upon a decree for title, has ever been prosecuted by the plaintiff and determined in his Conceding, then, that an action for mesne profits may be separately maintained under our statute, which question is reserved, (Lee v. Bowman, 55 Mo. 400,) and that the owner of land has the same right to maintain such action which he had at common law, yet it does not appear from the petition that the plaintiff has ever recovered the possession of the premises in question; and it is well settled, both at common law and under statutes, regulating the action of ejectment and allowing a recovery therein for waste and injury and mesne profits, that there can be no recovery of mesne profits until there has first been a recovery of possession, and this for a very obvious reason. plaintiff may have the legal title, but he may not been titled to the possession; and he must first establish his right to the possession, during the period for which he claims the rents and profits, before he can recover the rents and profits during such period. Burton v. Austin, 4 Ver. 105; Smith

v. Benson, 9 Ver. 138; Baron v. Abeel, 3 Johns. R. 481; Brown v. Galloway, 1 Pet. C. C. 291; Jackson v. Stone, 13 Johns. 447; Van Alen v. Rogers, 1 Johnson's Cases 281. As to waste and injury, vide Hawkins v. Roby, 77 Mo. 140.

As to the claim for re-imbursement of damages, paid to the defendant under the judgment rendered in his favor, and the attorney's fees and costs in said case, as long as that judgment stands unreversed, they cannot be recovered.

We are all of the opinion that the judgment of the circuit court should be affirmed.

May et al., Administrators, Appellants, v. Burk.

- Practice: Parties: Foreign administrators. Foreign administrators cannot sue in the courts of this State; but if such defect of parties is not taken advantage of in the trial court by demurrer or answer, it will be deemed to be waived, and objection cannot be raised for the first time in the Supreme Court.
- 2. Pleading: SEVERAL DEFENSES. The several pleas of non est factum as to the instrument sued on, payment of another debt on a different note only appearing in suit by pleading and evidence tending to show why defendant is not liable on the note sued on, and the statute of limitations, do not constitute inconsistent defenses.
- A CASE where the defendant is not incompetent as a witness, neither
 of the original parties to the contract in controversy being dead.
- Execution of Contract, when Question for Jury. Where
 the evidence is conflicting upon the question of the execution of a
 contract, it should be submitted to the jury for determination.
- 5. Principal: SURETY: SUBROGATION. Where the purchaser of bank stock borrowed the money with which to pay for the same, giving his note therefor with personal security, the stock to be retained in the bank as further security to the payee of the note, and, after the death of the principal, the payee obtains judgment against the surety, such surety, as soon as he shall have paid the judgment, is entitled to be subrogated to the rights of the creditor in the principal's stock.
- 6. ____ If the administrators of the deceased principal

paid the judgment against his surety with the proceeds of the sale of the bank stock, upon the agreement of the surety to refund to them any excess of liabilities of decedent's estate over assets, then the surety was not a creditor of the estate, and the agreement was without consideration.

Appeal from Randolph Circuit Court.—Hon. G. H. Burck-Hartt, Judge.

AFFIRMED.

John R. Christian for appellants.

This suit is on a bond given by Burk to James May and James Doolin, and it can be maintained as a personal action between these parties, and all that part of the petition about being administrators' acts may be treated as surplus-Thomas v. Relfe, 9 Mo. 377. The question of the right of plaintiffs to maintain this action was not raised in the lower court, and it is too late to raise it in this court. The fourth instruction asked by plaintiffs ought to have been given, as there was no evidence to show that Burk had a lien on the bank stock. The answer of defendant is inconsistent. Thornton v. Irwin, 43 Mo. 153; Sheppard v. Starratt, 35 Mo. 367. The entire testimony of Burk, save that part where he said he never signed the bond, ought not to have been admitted. The fact that the evidence is strongly for the plaintiffs, is a matter that deserves due consideration.

Kimbrough & Terrill for respondent.

The court did not commit error in refusing the fourth, fifth and sixth instructions asked by plaintiffs, and in giving the sixth asked by defendant. Clements v. Yeates, 69 Mo. 623. It was competent for defendant to testify to the agreement and arrangement made with him by plaintiffs, after they had been appointed administrators of the estate of V. P. Moore, deceased. R. S. 1879, p. 687, § 4010; Allen

v. Allen, 26 Mo. 331; Leeper v. McGuire, 57 Mo. 361. Where there is any evidence to support the verdict of the jury, or where the evidence is conflicting, this court will not reverse upon mere weight of evidence. Grove v. City of Kansas, 75 Mo. 672; Hodges v. Black, 76 Mo. 537; Roach v. Colburn, 76 Mo. 653. Inasmuch as appellants received their appointment and qualification as administrators of the estate of V. P. Moore in Kentucky, they have no authority to sue as such in this State. Morton v. Hatch, 54 Mo. 411. And as this objection is apparent upon the face of the record, this court will examine it. Bateson v. Clarkson, 37 Mo. 34, 35; State to use, etc., v. Mason, 38 Mo. 489.

Ewing, C.—Plaintiffs alleged they were appointed administrators of V. P. Moore in Kentucky. That one Wm. Gibson held Moore's note for \$2,500, on which defendant, Burk was security; that Gibson sued Burk on the note and obtained judgment for \$2,583.35; that on the same day the defendant, Burk, executed and delivered to plaintiffs the following contract:

"Whereas, James May and James Doolin, administrators of V. P. Moore, deceased, have this day settled a judgment in the Pulaski circuit court in favor of William Gibson against me on a note for \$2,500, with interest and cost, to which I was surety for said Moore. Now, I hereby bind and obligate myself to pay back and refund to said administrators my due proportion of any excess of liabilities over assets, should said estate not be solvent in proportion to the amount they have this day paid on said debt, October 7th, 1871.

S. Burk."

That Moore's estate only paid 74½ per cent on the dollar, and ask judgment against Burk for the difference between that sum and 100 cents on the dollar. The material part of defendant's answer was as follows:

"Defendant avers that the note aforesaid was executed to William Gibson by V. P. Moore as principal, and the defendant, Burk, as surety, to enable Moore to obtain money

with which to pay for bank stock for which he had subscribed in the National Bank of Summerset, located in Pulaski county, Kentucky, and that at the time of execution of said note to said Gibson, it was agreed and understood by and between the said V. P. Moore, William Gibson and this defendant, that said bank stock was to remain in said bank, with the officers thereof, as additional security to said Gibson on said note, until the same was paid, and that said V. P. Moore, before defendant would become his surety on said note, agreed with this defendant that said bank stock should remain in said bank as additional security for said note to said Gibson for the benefit of this defendant, and to save him harmless on said note until the same should be paid by said Moore, or in case of a sale of said bank stock before said note was paid, that the proceeds of the sale should be applied to the payment of said note; that he signed said note as surety for Moore in consideration of said agreement."

The plaintiffs, as administrators of Moore's estate, paid the said note to Gibson on the 7th day of October, 1871, by a transfer of said bank stock to said Gibson in pursuance of the said contract of the said V. P. Moore, deceased.

Defendant alleges in his amended answer that he demanded "that the proceeds of said bank stock should be applied to the payment of the said note to said William Gibson in pursuance of the said agreement; that said payment of said judgment was made by said administrators, because they well knew that it was their duty under the law to satisfy said judgment; denies that defendant executed his agreement in writing to plaintiffs, binding him to refund and pay to plaintiffs any portion of said \$2,583.35; denies that he ever executed the instrument sued on; that as to whether, under the laws of Kentucky, plaintiffs can at any time within five years after the discovery of an error in over-paying a creditor of an estate under administration, recover the same from said creditor, he has no knowledge or information sufficient to form a belief, but avers that he

is not now, and has not been, since the death of said Moore, a creditor of his estate, and avers that plaintiffs have never paid him any money as a creditor of said estate; denies that plaintiffs used reasonable, fair and proper diligence in winding up and settling up said estate, and, with such speed as the nature of the case would admit; denies plaintiffs' allegation that they used fair and proper diligence as administrators."

Defendant alleged in his amended answer, "that said estate was amply sufficient to pay all indebtedness against it, if the same had been properly and faithfully managed by plaintiffs; that plaintiffs' alleged cause of action has not accrued within the last five years, next before, bringing of this suit, and, that he pleads the statute of limitations as a bar to plaintiffs' recovery." The reply was a general denial of new matter in the answer.

I. This is a suit by foreign administrators, as appears by the petition, which might have been taken advantage of by the defendant, in the court below, by demurrer or answer, but which not being done, it is too late to raise the question here. Chouteau v. Burlando, 20 Mo. 483; Morton v. Hatch, 54 Mo. 408; State ex rel. v. Berning, 74 Mo. 87; St. L., I. M. & S. R. R. Co. v. Anthony, 73 Mo. 431; Reugger v. Lindenberger, 53 Mo. 364; R. S. 1879, § 3519.

II. The plaintiffs demurred to the answer, because as alleged, it did not state a defense to the action, if true; that the answer is inconsistent in its various defenses, etc., and cites as authority 35 Mo. 367, Sheppard v. Starrett. In that case it was held that in a suit on a note, the defenses of non est factum, and payment are inconsistent, and not permissible. But there is no such question presented here. In the case at bar, the defendant pleads non est factum, as to the instrument sued on, and payment of another debt on a different note, and, which only appears in this suit by pleading, and evidence tending to show why the defendant is not liable in this suit. Defendant also pleads the statute of limitations, which is in no wise inconsistent with his other

defenses. The defendant first alleged a state of facts which, if true, was a good defense. He then denied the execution of the instrument sued on, and, thirdly, the statute of limitations. Rhine v. Montgomery, 50 Mo. 566; Little v. Harrington, 71 Mo. 390; R. S. 1879, § 3513, 3532. The demurrer was properly overruled.

III. The court did not err in permitting the defendant Burk to testify. This was not a suit on a cause of action, where one of the original parties to the contract is dead. The instrument sued on is alleged to have been made by the defendant, and delivered to the plaintiffs. R. S. 1879, § 4010.

IV. The court below did not err in instructing the jury. The evidence was conflicting on the question of the execution of the contract; that question was, therefore, properly submitted to the jury, and they found for the defendant.

V. The evidence very strongly tends to prove the facts alleged in the answer, to-wit: That the note given to Gibson was for money borrowed by Moore with Burk as security, and, that the money was used to pay for stock in a bank which Moore purchased; that this bank stock was to be retained in the bank as further security to Gibson; that after Gibson got the judgment against Burk on the note, the plaintiffs then agreed with Burk to pay it off, and did pay it by a sale of the bank stock to Gibson, at a small premium. These being the facts, there is no doubt, but that Burke was entitled to be substituted to the rights of the creditor, Gibson, in Moore's stock, as soon as he could pay off the judgment. These facts also show, that Moore's administrators paid off Moore's debt with his bank stock, and hence, Burk never was a creditor of the estate, and there was no consideration for the agreement sued on, even if it was executed by Burk. If Burk had paid the Gibson judgment, he would then have been entitled to be substituted for the creditor, Gibson. Moore's bank stock would have then belonged to Burk, to the extent of the debt paid by him, and the residue, if any, would go to Moore's

administrators. Miller v. Woodward, 8 Mo. 169; Allison v. Sutherlin, 50 Mo. 274.

The judgment below is affirmed. All concur.

THE STATE V. DUNN, Appellant.

- 1. Practice Criminal: DISCHARGE OF JURY: JUDICIAL DISCRETION. Where a trial court has a discretion in a matter of practice, its exercise of the same is presumed to be sound and correct until the contrary is plainly and manifestly made to appear, and on the facts presented in the present case, it fails to appear that the trial court abused its discretion in discharging the juries on two trials of defendant for murder, because they could not agree on a verdict.
- 2. Statute: MANSLAUGHTER: INTENTIONAL KILLING. Where the killing is intentional, there can be no manslaughter in the third degree under Revised Statutes, section 1244, nor in the fourth degree under Revised Statutes, section 1249.
- 3. Manslaughter in Fourth Degree: STATUTE. Where the evidence shows that the defendant was the aggressor, and provoked the difficulty which resulted in the homicide, and intentionally killed the deceased, there can be no manslaughter at common law, and consequently none in the fourth degree under Revised Statutes, section 1250.
- Practice Criminal: HARMLESS INSTRUCTIONS. A defendant cannot complain of the giving of an instruction as to a grade of manslaughter, of which he was not convicted, even though the instruction was erroneous.
- Verdict: IMPEACHMENT OF. A verdict of a jury cannot be impeached, either by the affidavit of a juror, or by statements of the latter to third persons.

Appeal from Saline Criminal Court.—Hon. J. E. RYLAND, Judge.

AFFIRMED.

Boyd & Sebree for appellant.

The discretion given the trial court by section 23 of

article 2 of the constitution, to discharge a jury in a criminal cause "if the jury fail to render a verdict," is a legal discretion, and must amount to a legal necessity, and the record should show that the circumstances under which the jury is discharged, are such as from which it appears impossible that a verdict can be had in a reasonable time, and without forcing a conclusion by hardship to The fact that the jury, after being out "one day," (as in this case,) and then reporting that they are "unable to agree," is not sufficient, unless the court itself is satisfied they cannot agree, and the record should show affirmatively that the court was so satisfied. Wharton Crim, Plead. and Prac., §§ 500, 504, 508; Bishop Crim. Law, (6 Ed.) vol. 1, §§ 1034, 1035, 1036, 1033, and note to § 1034; Cooley Const. Lim., p. 325, § 327; U. S. v. Harkell, 4 Wash. C. C. R. 409; U. S. v. Perez, 9 Wheat. 579; Comm. v. Cook, 6 Searg. & R. 577; Comm. v. Purchase, 2 Peck. 521; Ex parte Mc-Laughlin, 41 Cal. 212; People v. Cage, 48 Cal. 323; O'Brian v. Comm., 9 Bush. 383; Teat v. State, 53 Miss. 439; Finch v. State, 53 Miss. 363; State v. Hays, 79 Mo. 600. The defendant was placed in jeopardy when the jury was sworn to try the cause at September term, 1882, the indictment being valid, and he having been duly arraigned, and plea of "not guilty" having been entered, and even if the discharge of the jury at September term was in the exercise of "legal discretion," the subsequent dismissal of the cause by the State's attorney at March term, 1883, operated as an acquittal. State v. Hays, 79 Mo. 600; Lee v. State, 26 Ark. 260; Bell v. State, 44 Ala. 393; State v. Callendine, 8 Iowa 288; Bishop Crim. Law, § 1013. The discretion given the court by the constitution extends to the discharge of the jury The additional words "and commit or bail the prisoner for trial at the next term of court, or if the state of business will permit, at same term," give no discretion as to the subsequent proceedings of the court, but is both directory and mandatory, and at the same time a limitation on the power of the court. It cannot give a discretion as

to committing or bailing the prisoner, because the constitution itself provides when a prisoner shall be bailed, and when he shall not be bailed. § 24, art. 2, Const. Mo.

The defendant had the constitutional right to trial at the September term, 1883, of the trial court, and the court having arbitrarily deprived him of that right, he should be discharged. Const., art. 2, § 22; Cooley's Const. Lim. 311; Ex parte Stanley, 4 Nev. It was the duty of the trial court in this case, to have given instructions as to manslaughter in the third and fourth degrees. The evidence shows that deceased made the first assault, and struck the first blow, and that the killing was by "a dangerous weapon," and the court did instruct as to manslaughter in the second degree. See State v. Branstetter, 65 Mo. 152; State v. Edwards, 70 Mo. 480. The fourth, fifth, seventh and eighth instructions for the State, should not have been given, and the thirteenth asked by defendant should have been given. The affidavit of Edward F. Nichols was sufficient and competent to show misconduct of the jury, and should have been received for that purpose by the court. State v. Branstetter, 65 Mo. 148.

D. H. McIntyre, Attorney General, for the State.

The special plea in bar constituted no defense to a further prosecution. Cooley's Const. Lim., (3 Ed.) top p. 327; Const. 1875, art. 2, § 23; State v. Sims, 71 Mo. 538; R. S., § 1657. The instructions given for the State were proper. State v. Ellis, 74 Mo. 207, 220; State v. Talbott, 73 Mo. 357; State v. Curtis, 70 Mo. 594. Upon an appeal from a conviction of murder in the second degree, the court will not examine alleged errors in instructions for murder in the first degree. State v. Underwood, 57 Mo. 40; State v. Fritterer, 65 Mo. 442. There was no error in refusing the defendant's instructions numbered six, seven, twelve, thirteen and fourteen. There was no evidence authorizing the giving of an instruction on manslaughter in the third and fourth degrees. A verdict of the jury cannot be impeached

by the affidavit of a juror; nor can this be done by the declarations of jurors to third persons. 75 Mo. 570; State v. Dieckman, 11 Mo. App. 538; Coker v. Hays, 16 Fla. 368; Drummond v. Leslie, 5 Blackf. (Ind.) 453; Clum v. Smith, 5 Hill 560; State v. Fox, 79 Mo. 109.

RAY, J.—The defendant was indicted at the November term, 1882, of the criminal court of Saline county, for the killing of Frank Edwards, on the 29th of August, 1882, in said county. The indictment was for murder in the second degree.

At the same term, as shown by the record, the defendant being duly arraigned, pleaded not guilty, and a jury being empanelled, the trial began on the 27th of that month, and, after hearing the evidence, the instructions of the court, and the argument of counsel, the jury on the 28th retired to consider of their verdict, and on the 29th returned into court, and being unable to agree, they were discharged by the court, and it was thereupon ordered by the court, that the bail of defendant be fixed at \$2,000; whereupon court adjourned, until court in course.

So far as the record shows this action of the court, in discharging the jury and adjourning the court, was without objection on the part of defendant or his counsel; nor does it appear, that defendant demanded or asked another trial at that term. At the March term, 1883, the defendant was re-indicted for the same killing; this indictment charging murder in the first degree; whereupon, by order of the court, the first indictment was quashed, at the instance of the State's attorney. Thereupon, also, the defendant being arraigned on the new indictment, filed his motion to quash the same, which, was overruled by the court and excepted to by the defendant; the record, however, nowhere sets out this motion, or shows what it contained.

The defendant then filed special plea of former acquittal, on the ground of the discharge of the jury, and the continuance of the cause at the September term, 1882, and the quash-

ing of the first indictment, at the March term, 1883, which plea was by the court overruled and excepted to by defendant; whereupon, to-wit, on the 22d of March, 1883, the defendant being arraigned on the new indictment, pleaded not guilty, and a jury being empanelled, the trial was commenced; and on the 24th, the evidence being in, the instructions of the court given, and the argument of counsel being concluded, the jury retired to consider of their verdict; and on the 27th, the jury being called, reported to the court that they were unable to agree upon a verdict; whereupon they were discharged by the court, to which order discharging said jury, the defendant objected; whereupon court adjourned until court in course. The record of this term of court, however, fails to show any bill of exceptions preserving any of the objections, or exceptions of the defendant to the various rulings of the court, at said term; nor was there any such bill, at the September term, 1882, as to the order and rulings of the court, at said prior term. At the September term, 1883, however, of said court, as shown by a formal bill of exceptions, duly filed, at said term. the defendant withdrew his plea of not guilty, in said cause, and thereupon filed a formal special plea in bar of "former acquittal," setting up in detail, his said arraignment and plea of not guilty to said first indictment, the empanelling of said jury, the commencement of said trial, the discharge of said jury upon their being unable to agree upon a verdict, and continuance of the cause, as shown by the record of said September term, 1882; and, also, his said re-indictment for same offense at the March term of said court, for the year 1883; the quashing of said first indictment; his arraignment and plea to said second indictment, the empanelling of said second jury; the commencement of said second trial, and the discharge of said jury because of their inability to agree upon a verdict, and continuance of the cause as shown by the record of that term; by reason whereof, defendant says that under the constitution and laws of the State, he has been legally acquitted of the offense

charged in said indictment, and that having thus once or twice been put in jeopardy by reason of the premises, he is now entitled to be discharged from all further prosecution therefor. In support of this special plea, the defendant offered in evidence the records of said court, whereupon, the court upon due consideration, overruled said plea; to which action of the court in overruling said plea, the defendant, in due time and manner, excepted and preserved the same by bill in due form. And the defendant failing, and refusing to plead further, the court thereupon entered for him the plea of not guilty.

A trial was thereupon had before a jury, resulting in a verdict of guilty of murder in the second degree, and assessing his punishment at ten years' imprisonment in the penitentiary, and judgment accordingly, from which the defendant, after an unsuccessful motion for new trial and

in arrest, has appealed to this court.

A number of instructions were given and refused at the final trial, and duly excepted to, which, together with the evidence in the cause, as well as the motions for new trial and in arrest, as far as deemed material, will be noticed

in the progress of this opinion.

The principal ground relied on for a reversal, and especially urged upon our attention, is the action of the court in overruling defendant's special plea in bar of former acquittal, above set out. The constitutional provision on the subject matter of defendant's plea, is found in the 23rd section of the bill of rights, in our constitution, which declares: "That no person shall be compelled to testify against himself, in a criminal cause, nor shall any person, after being once acquitted by a jury, be again for the same offence, put in jeopardy of life or liberty, but if the jury to which the question of his guilt or innocence is submitted, fail to render a verdict, the court before which the trial is had, may in its discretion discharge the jury, and commit or bail the prisoner for trial at the next term of court, or if the state of business will permit, at the same term; and if

judgment be arrested after a verdict of guilty, on a defective indictment, or if a judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

Tried by this rule, which is paramount to the rules found elsewhere, the plea in question, would seem to be manifestly bad, since it is not pretended that there has been an acquittal by jury; but it is insisted, by defendant's counsel, that the discretion, here given the court, to discharge the jury when they fail to render a verdict, is a "sound legal discretion," and that whenever it appears that that discretion has been arbitrarily or unsoundly exercised, such discharge, in legal contemplation, operates as an acquittal, within the meaning of the constitution, and entitles the defendant to his discharge. Concede, for the sake of argument, that this position is well taken, the question still remains, whether the record, in this case, shows that the court, in discharging said juries, or either of them, exercised its discretion, either arbitrarily or unsoundly. In such cases the rule is, that when the trial court has a discretion in matters of practice, its exercise is presumed to be sound and correct, unless the contrary is plainly and manifestly made to appear. In this case, nothing of the sort is shown. At the first trial, it is true that the jury were out but one day considering of their verdict, when, in the language of the record, they returned into court, and "being unable to agree," they were discharged by the court, and the cause continued. Here seems to be a judicial finding of record of the jury's being unable to agree; and without more, we cannot say, as a matter of law, that such finding is not true, or that the trial court that heard the evidence, saw the witnesses and knew the jurors in question, exercised an unsound discretion in so discharging the This is more manifest, when we consider that, so far as the record shows, or, indeed, otherwise appears, said dis-

charge of the jury was without objection on the part of defendant.

At the second trial, the jury were out three days, considering of their verdict, when "being called, they reported to the court that they were unable to agree upon a verdict," whereupon they were discharged by the court. It is true, that the defendant, at this term, did object to the order discharging the jury, but that objection could not have the effect to divest the court of its conceded discretion to judge and determine whether the report of the jury, so made to the court, was true or not. It may be conceded that the request of the prisoner, that the jury might be allowed, or even required to further consider of their verdict, ought not to be disregarded by the court in determining the question, yet, without more, it is in the sound discretion of the court to order their discharge, if in view of all the facts and circumstances, it is satisfied that the jury are unable to agree, after a reasonable time and opportunity has been afforded and they so report under oath. In this case, the jury had been out three days, and we are not prepared to say that the prisoner's objection alone should outweigh all other circumstances of public justice, or control the honest discretion of the court in deciding, as it seems to have done, that the jury, in point of fact, were unable to agree upon a verdict, and if so, its power and duty to discharge the jury cannot be questioned, and such discharge of the jury, so ordered, constitutes no bar to another trial. might be the effect of an arbitrary, unwarranted discharge of a jury, need not now be considered or discussed, as no such case is before us. State v. Jeffors, 64 Mo. 376, and authorities there cited. State v. Hays, 79 Mo. 600, properly considered, is in strict harmony with the views here expressed, and affords no color for the plea here set up and overruled. The trial court, therefore, committed no error in overruling said plea.

It is also objected that the court erred in failing to instruct the jury as to manslaughter in the third and fourth

degrees. No instructions were asked on this subject; but under previous rulings of this court, it has been held that "it is the duty of the court, in the trial of a criminal case, to give proper instructions defining each crime, of which, under the indictment, the accused can be convicted, and of which there is evidence in the case." State v. Branstetter 65 Mo. 149. In this case, was there evidence of manslaughter in either the third or fourth degree? Under section 1244, Revision 1879, there can be no manslaughter in the third degree, when the killing was with the design to effect death. In this case, it is manifest from the testimony, that the killing was intentional. It could not, therefore, be manslaughter in the third degree, and consequently, no duty devolved upon the court to instruct as to that crime. For a similar reason, there could be no manslaughter in the fourth degree, as defined by section 1249, Revision 1879, as it cannot be pretended, under the evidence in the cause, that the killing was involuntary. If one inflict a mortal wound, with a deadly weapon, upon a vital part, as in this case, he must be presumed to have designed the natural consequences of his act. State v. McDonnell, 32 Vt. 492.

If, therefore, there is in this case manslaughter in the fourth degree, it must be by reason of section 1250 of the Revision of 1879, which declares that: "Every other killing of a human being, by the act, procurement or culpable negligence of another, which would be manslaughter at common law, and which is not excusable or justifiable, or is not declared in this chapter to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree." See State v. Edwards, 70 Mo. 480.

At common law, it is true, it was held that "in some circumstances when one intends to take life, and does it, his offense is manslaughter and not murder." Thus, in the language of Redfield, C. J., sitting in the Vermont court, "if the jury should regard this as a bona fide case of mutual combat, without previous malice on the part of the accused, and that mutual blows were given before the ac-

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cused drew his knife, and that he drew it in the heat and fury of the fight, and dealt a mortal wound, although with the purpose of doing just what he did do, that is, of taking life, or, what would be that intent, if he had been in such a state, as properly to comprehend the nature of his act, still it is but manslaughter." 2 Bishop on Crim. Law, § 676; State v. McDonnell, 32 Vt. 491. To the like effect is Dennison v. State, 13 Ind. 510.

Can it be said that the case at bar falls within the common law rule of manslaughter above laid down, so as to have made it incumbent on the court to have given aninstruction on manslaughter in the fourth degree? Does the evidence show this to have been a bona fide case of mutual combat, without previous malice on the part of the accused: or does it show, or tend to show, that mutual blows were given before the accused drew his knife, or that he drew it for the first time, in the heat and fury of the fight, and dealt the mortal blow in question? A careful examination of the record before us, shows very plainly, we think, that the defendant's case does not come within the common law rule of manslaughter above stated, either as to the question of previous malice, or as to the time at which defendant drew his knife. In the combat that ensued, the evidence is abundant that the defendant was the aggressor, and provoked and brought on the conflict. Some months before the night of the homicide, as shown by the record, the deceased and defendant had a misunderstanding and disagreement as to the amount of wood hauled by deceased for defendant. After that, deceased sued defendant on this account and got judgment for the sum claimed by him. Afterwards, in a conversation with Montgomery, who had rented some land of defendant, on which he raised a crop of wheat, Mont. gomery told defendant that Edwards, the deceased, had promised to help him thrash the wheat. Dunn said he did not want him, Montgomery, to hire Edwards to help thrash the wheat, as he and Edwards might have trouble. Dunn also said that if Edwards knew he had an interest in the

wheat, he might run a garnishment on it, and if he did, he would kill him.

The difficulty and homicide in question, occurred about 11 or 12 o'clock, on the night of the 29th of August, 1882, in the town of Slater, Saline county, Mo. During the earlier part of the night, the defendant and deceased, with Nichols, Snider and others, had been in Hannehan's saloon, where some of the party were playing ball pool-About 11 o'clock the saloon closed up, and the various parties left for home. It seems that the deceased accompanied Nichols home, and, that when they arrived there, they opened the gate, passed through the front yard, up to the front door of the dwelling, where they were standing and talking, when defendant and Snider, on their way from the saloon to the defendant's residence, passed by; and when opposite the front gate of Durnell, who lived on the adjoining lot west of Nichols, defendant checked his companion, Snider, and stopped; and then called to the deceased by name two or three times, to come out there, that he wanted to see him, or settle with him. It also appears that on the way from the saloon, and before they reached Nichols' house, the defendant mentioned to Snider, his disagreement with deceased about the wood account, and said it was When the defendant called to the deceased to come out, he answered and came out on the sidewalk near where defendant was standing, close to Durnell's gate, and leaned against the fence. Some conversation passed between defendant and deceased about settling the wood account. Defendant proposed to pay \$3 and settle the same; but deceased claimed \$6, and refused to settle on defendant's terms. Further conversation ensued, and the parties soon became angry, and indulged in abusive epithets, calling each other liars and other hard names. This wrangling lasted for some considerable time, and became so noisy as to attract other parties in the vicinity. While the quarreling was going on, defendant was seen to have his knife open in his hands. He afterwards shut it, but as he

advanced toward the deceased, he was seen to put his hands together before him, as though he was opening his knife. As the quarreling continued he approached the deceased, as one of the witnesses expressed it, "by intervals." He came up a little and stopped and quarreled again, and when he got up pretty close, he then, as the witness expressed it, "rushed upon" the deceased, and the fighting commenced. Some of the witnesses say, as they thus came together, that the deceased struck the first blow. But there can be no question, but what the defendant was the aggressor and brought on the conflict. Some blows were exchanged on the sidewalk when the fight commenced when the parties clinched, fell and rolled off the sidewalk into the gutter, or street. Edwards was on top and Dunn beneath, and, during the scuffle, Edwards beat and pounded the defendant with his fist until defendant hollowed enough. when the deceased got off, or was pushed off, and staggered across the sidewalk to the fence, near Durnell's gate, when he hung on the fence and died almost instantly. Upon examination of his body, it was found that he was cut in eleven different places. None of the wounds, however, except the one in the neck, were serious or dangerous. The one in the neck was necessarily fatal. This wound was large and deep, and by it "the jugular vein, both carotid arteries, the glosso-pharyngeal and the pneumogastric nerve were all severed." From the wound the blood spurted out freely on the ground and across the sidewalk, where the deceased hung on the fence. One of the witnesses says this spurting of blood took place, while the parties were striking each other, and before they fell. Another witness says that it was after the deceased arose from the combat. The latter was doubtless correct as to the time. With such a wound thus inflicted, the defendant, under all the rules of law and evidence, must be held to have intentionally killed the deceased; and, under such circumstances, it was not error in the court to fail to instruct as to manslaughter in the fourth degree. There was

much evidence of physicians and surgeons, as to the paralyzing effect of such a wound, tending to show that the victim, after its infliction, could neither talk, walk or repeat blows, and must necessarily die almost instantly. The evidence, however, shows that the deceased got up, at the conclusion of the fight on the ground, at the edge of the street, and walked or staggered across the sidewalk to the fence, where he hung dying. Next morning a small, four-bladed congress knife was found on the ground where the scuffle occurred, open and bloody, and identified as the knife of defendant. When the defendant got off of the deceased, he rose and held out his empty hands, saying that he did not want to hurt deceased, and calling on by-standers to see that he had nothing in his hands. There is no evidence showing, or tending to show, that defendant drew his knife after the combat commenced, or during the heat and fury of the fight. All the evidence in the case tending to show, that he drew the knife before any blows were struck, and that he went into the fight with his knife open. It is also insisted for defendant, that the court erred in giving the 3rd, 4th, 5th, 7th and 8th instructions for the State, and in refusing the 13th, asked by defendant. The 3rd instruction was in reference to manslaughter in the second degree, of which the defendant was not convicted, and of which. if erroneous, he cannot complain. The 4th and 5th are, in substance, such as has often been approved by this court, and furnish no cause for reversal. The 7th and 8th have reference to the plea of self-defense, and are in harmony with previous rulings of this court. The 7th instruction is substantially like the one on the same subject, given and approved in the case of the State v. Starr, 38 Mo. 274. To the same effect, also, are the following cases: State v. Brown, 64 Mo. 367; State v. Christian, 66 Mo. 138; State v. Brown, 63 Mo. 439; State v. Underwood, 57 Mo. 40.

The 13th instruction asked for defendant, had reference to the credibility of a witness. The jury, in other instructions had already been told that they were the sole judges

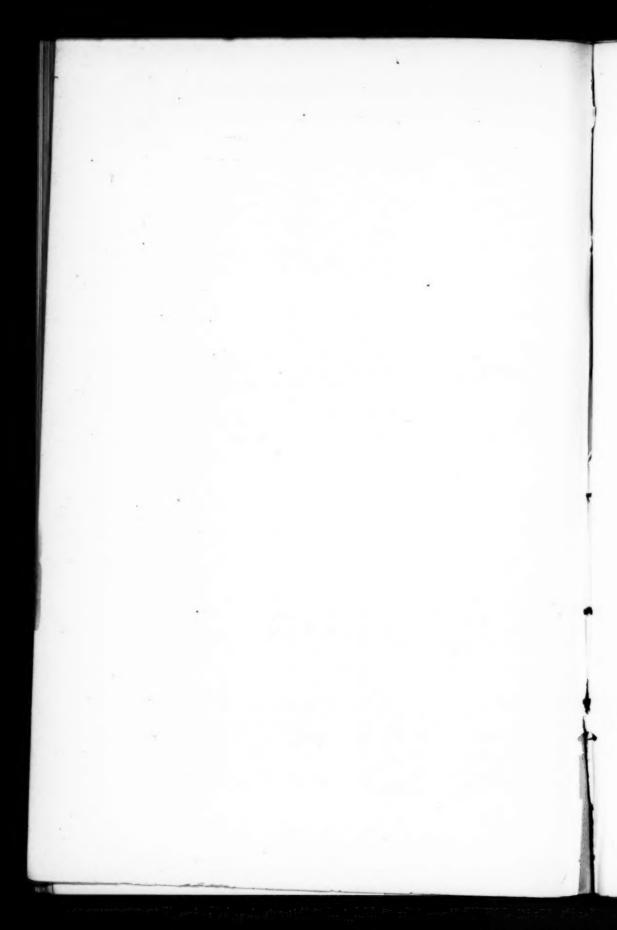
of the weight of the evidence, and the credibility of the witnesses, and it was unnecessary to repeat it. The last objection urged for defendant, has reference to the manner in which the jury were alleged to have reached their verdict, and the nature of the proof by which it was sought to establish the same. It has often been held that a juror was not competent to impeach his verdict. State v. Branstetter, 65 Mo. 149. In this case it was offered to show this fact, by affidavit of a third party, to the effect that the juror had so told him. What the juror cannot do directly, he cannot accomplish indirectly, by disclosing the same to a third party, and then render competent the information so obtained. This is not permissible.

The cause seems to have been fairly tried, under proper instructions, and finding no error in the record, the judgment of the criminal court is, therefore, affirmed. All concur, except Henry, J., who dissents.

HENRY, J., DISSENTING .- I think that the court should have given an instruction upon manslaughter in the 4th degree. In refusing it, the court assumed that defendant opened his knife before the combat commenced, and, that he was prompted by his malice towards deceased to seek a difficulty with him. Two questions, which it was the province of the jury to pass upon. The evidence shows that at one time, before the fight commenced, defendant had his knife open, but it is equally positive, that before the combat, he shut his knife; what he did with it, does not appear. He was not seen to open it afterwards. It was not afterward seen in his hands, and the only evidence to show that he opened the knife before the fight began, was, that "he was seen to put his hands together, as though he was opening his knife." If it was a material question whether the knife was again opened, before the parties engaged in the conflict, was it so clear and manifest, that it was opened before the fight, that the court could assume that fact? Was the evidence so clear and conclusive that

defendant called the deceased to him, not as he said, to have a settlement of their pecuniary difference, but in order to provoke a difficulty, and get an opportunity to kill him, or do him some great bodily harm, that the court could assume that, as a fact in the case?

With due deference to my associates, I think not, and, therefore, enter my dissent.



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ACCOUNT STATED.

Account stated: for what opened. After the completion of a building the owner and the builder had an accounting and settlement, and the owner, without making any claim for damages caused by delay in the prosecution of the work, gave his note for the balance found to be due. Held, that in the absence of fraud in procuring the settlement, mistake in making it, or ignorance of his rights when it was made, the owner could not defend against the note on the ground that there had been such delay resulting in damage to him. Pickel v. The St. Louis Chamber of Commerce Association, 65.

ADMINISTRATION.

- 1. Administration: order of sale of real estate is not such a final order as will conclude the heirs of the decedent from showing, upon the incoming of the report of sale, that there are no debts, or that there are personal assets sufficient to pay all debts, or any other fact tending to show that the order ought not to have been made. Fenix v. Fenix, 27.
- 2. Administrator's sale: error in deed: equity for title. Where a purchaser of land at administrator's sale pays the purchase money, and the same is applied in discharge of the debts of the decedent, but the land is not correctly described in the administrator's deed, an assignee of the purchaser will be entitled to a decree in equity correcting the error and divesting the legal title to the land out of the heirs of the decedent and vesting it in him. Grayson v. Weddle, 39.
- 3. ADMINISTRATION: FINAL SETTLEMENT SET ASIDE FOR FRAUD. If an administrator fails to account for interest collected on loans of money of the estate, and conceals from the court and the heirs the fact that he has collected such interest, the latter will be entitled to have his final settlement set aside and an account taken. Smiley v. Smiley, 44.
- 4. ADMINISTRATOR: LEGAL EFFECT OF HIS NOTE IN LOUISIANA. By the law of the state of Louisiana an administrator cannot, by executing a promissory note in his name as administrator, bind the estate of

the decedent; but he will ordinarily bind himself. If, however, he can show by competent evidence that the note was executed and received merely as an acknowledgment that the estate owed the debt, he will be permitted to do so; but parol evidence is not competent. Stirling v. Winter's Executor, 141.

- 5. —: FINAL SETTLEMENT, WHEN VACATED. The final settlement of an administrator has the force and effect of a judgment, and can be vacated only for fraud or mistake. McLean v. Bermer. 414.
- 6. FINAL SETTLEMENT: NOTICE OF IN ENGLISH-GERMAN PAPER. A notice of final settlement of an administrator is sufficient when published in the English language, and on the English side of a newspaper published and printed in both the English and German languages, one side of the paper being German and the other English. Ib.
- 7. ADMINISTRATOR: PROMISE MADE TO, AFTER DECEDENT'S DEATH. An administrator can sue in his representative capacity on a promise made to him after the death of the decedent, for the benefit of the estate. Mosman v. Bender, 579.
- 8. ——: CONTRACTS BY. Where an administrator, acting for the best interests of the estate, releases a levy of execution on land which is subject to a lien of a prior judgment in favor of a third person for more than its value, in consideration of a promise to him to pay one-half of the judgment due the estate, such contract is not unlawful, and may be enforced against the promisor. Ib.
- 9. Administration: Limitations. Under the Administration Law, (R. S. 1879, § 189,) if no cause of action has accrued or exists in favor of the claimant upon his contract or claim when the two years' limitation begins to run, it is not a demand against the estate, within the meaning of the statute, and the limitation does not begin to run before the cause of action has accrued. Tenny v. Lasley, 664.
- 10. ——: ALLOWANCE OF DEMANDS NOT DUE. Revised Statutes 1879, sections 205, 206 of the Administration Law, relating to demands not due, contemplate demands existing in favor of a person in being, in whose favor a judgment may be rendered upon the demands prior to the maturity of the same, and refer to demands with some fixed or certain date of maturity, so as to admit of the rebate of six per cent from the date of judgment till the date of maturity. Ib.
- 11. Land title, Legal, equitable: Notice: administration. Where one acquires the legal title to land with notice of some equitable right of another therein, such equitable right so held by such other person is an interest in the land, which can be sold and transferred by his administrator. Atkison v. Henry, 670.

ADMISSIONS.

SEE ESTOPPEL

ADVERSE POSSESSION.

- 1. Estates for Life and in remainder: adverse possession. The possession of a life tenant is not adverse to the estate of the remainderman, and he cannot, by his declarations, acts or claim of a greater or different estate, make it adverse, so as to enable himself or others claiming under him to invoke the statute of limitations. Keith v. Keith, 125.
- 2. Adverse possession: Acceptance of deed for less than the fee. Acceptance of a deed from the true owner granting a life estate to the acceptor, with remainder over, waives any rights the latter may have acquired by a former adverse possession, and precludes him and those claiming under him from asserting that his subsequent possession is adverse as against the remainderman. Ib.
- Statute of limitations, when it cannot be invoked. The bar of
 the statute of limitations cannot be invoked where the occupancy
 relied on to support it, is neither adverse, nor accompanied by any
 act showing a claim of exclusive ownership. Burke v. Adams, 504.

AGENCY.

SEE PRINCIPAL AND AGENT.

ALIMONY.

SEE DIVORCE.

AMENDMENT.

SEE MANDAMUS, 2.

APPEALS.

- 1. Justice's court: APPEAL: NONSUIT: BAR. The plaintiff on appeal from a justice's court, has the right to dismiss his appeal in the circuit court, and thereby vacate entirely the judgment of the justice, and such judgment of nonsuit in the circuit court, and judgment of the justice, constitute no bar to another action. Lee v. Kaiser, 431.
- 2. ——: NOTICE: DISMISSAL. An appeal having been taken more than ten days before the next term of the circuit court, and notice thereof served within three days of the next succeeding term, Held, that necessity of notice relates to the time when it becomes triable against the appellee, that the appeal had been perfected and the court had jurisdiction, and the appeal could be dismissed at such succeeding term, and pending a motion to affirm the judgment of the justice. Ib.

- 3. APPEAL: SUPERSEDEAS. The circuit court of the city of St. Louis granted, of its own motion, a new trial to plaintiff in a cause pending therein, and in obedience to a peremptory writ of mandamus from the St. Louis court of appeals, procured and served at the instance of the defendant in the cause in the circuit court, the order granting the new trial was vacated on terms imposed by the judgment of the court of appeals, Held, that neither the appeal with supersedeas bond taken by the judge of the circuit court to the Supreme Court, from the judgment in the mandamus proceeding, nor the same taken by the relator therein, being the defendant in the cause in the circuit court, would operate to stay a trial of said cause in the circuit court. The State ex rel. Brainerd v. Thayer, 436.
- An appeal can operate as a supersedeas only in the case in which it is taken Ib.
- 5. OPENING ROAD: APPEAL: CERTIORARI. When all the errors committed in the proceedings in the county court, in the matter of opening a road, could have been corrected on appeal to the circuit court, and the relator was not prevented from taking his appeal by any misfortune to him, or by any fraudulent or unfair practice of his adversaries, he will not be permitted to have said proceedings reviewed by a writ of certiorari. The State ex rel. Baublits v. The County Court of Nodaway County, 500.
- 6. APPEAL FROM JUSTICE'S COURT, WHEN TRIABLE. Where an appeal from a judgment of a justice of the peace was not taken on the day it was rendered, and no notice of appeal was given, and the appelled did not enter his appearance on or before the second day of the first term of the appellate court, it is error for such court to hear the case and render judgment at such first term. Hawley v. The Missouri Pacific Railway Company, 540.
- APPEAL: FINAL JUDGMENT. An order dissolving an attachment, is not a final judgment from which an appeal will lie. Jones v. Evans, 565.
- 8. JUSTICES OF THE PEACE: APPEAL: CORPORATIONS: RESIDENCE. A corporation, although chartered in another state, which keeps in this State an office or agent for the transaction of its usual and customary business, has a legal residence here in the county of such office or agent, and must prosecute its appeals from the judgment of a justice of the peace within ten days after rendition thereof. Harding v. The Chicago & Alton Railroad Company, 559.

ASSAULT TO RAPE.

SEE CRIMINAL LAW.

ASSIGNMENT.

Assignment: Possession: Fraud. Retention of possession of personal property by the assignor after assignment for benefit of creditors, is not per se fraudulent, and does not render the assignment void. Goodwin v. Kerr, 276.

- 2. Assignor and assignee: subsequent agreement. An assignment for benefit of creditors, free from fraud in its inception, duly executed, acknowledged and recorded, is not invalidated by a subsequent agreement between the assignor and assignee to disregard it, or by subsequent fraudulent acts on their part with respect to the assigned property. Ib.
- EVIDENCE. The conduct of the assignor and assignee subsequent to the assignment, is a matter for the consideration of the jury in determining whether the assignment was fraudulent in its inception. Ib.

BANKS.

Banking corporation: Power to Borrow money: Cashier's Authority. Where general banking powers are conferred by the charter of a banking corporation, the corporation may borrow money without having more specific authority therefor.

In order to show a cashier's authority to borrow money for his bank, it is not necessary to prove a power specially conferred upon him by the board of directors or a distinct ratification by them of the act after its consummation; his acts done in the ordinary course of the business actually confided to him as such cashier, are prima facie evidence that they fall within the scope of his duty. Donnell v. The Lewis County Savings Bank, 165.

- 2. ——: CORPORATION. If a bank borrows money and gives its note therefor, the fact that its officers may have misapplied the money cannot defeat the holder's right to recover. *Ib*.
- 3. Paper deposited in bank for collection and credit. If paper be deposited in or forwarded to a bank for collection, and in pursuance of the usual mode of dealing, the bank places the amount to the credit of the depositor, and the latter thereupon draws, or is entitled to draw, against the same as cash, this works a transfer of title so that the depositor cannot afterward claim the paper, and it is immaterial that if the paper is not paid the bank has the right to charge it back. Ayres v. Bank, 79 Mo. 421, followed and re-affirmed. Flannery v. Coates, 444.

SEE CORPORATIONS.

BILL OF EXCEPTIONS.

Bill of exceptions, matter of. A bill of exceptions cannot, as a general rule, include matters which did not occur at the term of the court at which it was filed. Jones v. Evans, 565.

SEE PRACTICE IN SUPREME COURT.

CHATTEL MORTGAGES.

SEE MORTGAGES AND DEEDS OF TRUST,

CONDEMNATION PROCEEDINGS.

SEE MUNICIPAL CORPORATIONS.

CONSTITUTIONAL LAW.

 Intermarriage between whites and negroes: constitutional Law. The act making intermarriage between white persons and negroes a felony, (R. S., § 1540,) is no violation of the 14th amendment of the Constitution of the United States.

Neither is that clause of the act which provides that the jury trying a party accused of such a marriage, may determine the proportion of negro blood in either party to the marriage from the appearance of such person, a violation of that clause of section 53, article 4 of the constitution of Missouri, which provides that "the general assembly shall not pass any local or special law regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding." The State v. Jackson, 175.

- "The privileges and immunities of citizens of the United States" protected by the 14th amendment, are such as are secured to them by the Constitution of the United States and laws enacted in pursuance thereof, and the right of unrestricted marriage is not among these. Ib.
- Implied Promises. The law never raises a promise where the evidence shows the parties intended none. The Aull Savings Bank v. Aull, 199.
- 4. Constitution: Local assessments. The power to pave the streets of the city of St. Louis, and to charge the costs of such improvements against the adjoining property, conferred by section 26, article 3, and section 18, article 6 of its charter, and the mode of its exercise prescribed by ordinance No. 12,041 of said city, are not in conflict with the provisions of the constitution of the State. Farrar v. The City of St. Louis, 379.
- 5. Special tax bills: circuit court, jurisdiction. Under the constitution of 1865, article 6, section 13, and Wagner's Statutes, (p. 430, § 2,) the circuit court of Jackson county had no jurisdiction of a suit to enforce the lien of a special tax bill for a less sum than \$50. Williams v. Payne, 409.
- 6. Criminal Law: information: constitution. The general assembly has no power under the constitution, to authorize criminal prosecutions by informations in the form of an affidavit of a private person, in lieu of informations as understood at common law. Affirming State v. Kelm, 79 Mo. 515. The State v. Brisco., 643.
- 7. Order of court, violation of: Imprisonment: constitution. The court can imprison a person until he obeys its lawful order, which it is in his power to perform, but it cannot, in making the order of commitment for enforcing its order, impose a fine or imprisonment as a punishment for the contempt of the offending party in disobeying the same, nor can it adjudge the payment and imprisonment till paid of costs and expenses incurred in the contempt proceeding, in favor of the adversary party, as this would be in violation of article 2, section 16 of the constitution, prohibiting imprisonment for debt. Exparte Crenshaw, 447

CONTEMPT.

- 1. Contempt: Punishment therefor. Petitioner was found guilty by the circuit court of Jackson county, of contempt in willfully violating its restraining order, by removing and refusing to return certain fixtures in controversy in a pending civil suit, and was adjudged to pay the adversary party therein \$150, as costs and expenses incurred by the latter in the contempt proceeding; also to pay a fine of \$500, and that he restore the property mentioned in the order and be committed to jail until he paid said sums of money and returned the property, Held, that so much of the judgment of the court as related to the payment of the fine and the \$150, was illegal and void. Ex parte Crenshaw, 447.
- 2. Orders of court, violation of: Imprisonment: constitution. The court can imprison a person until he obeys its lawful order, which it is in his power to perform, but it cannot, in making the order of commitment for enforcing its order, impose a fine or imprisonment as a punishment for the contempt of the offending party in disobeying the same, nor can it adjudge the payment and imprisonment till paid of costs and expenses incurred in the contempt proceeding, in favor of the adversary party, as this would be in violation of article 2, section 16 of the constitution, prohibiting imprisonment for debt. Ib.

CONTRACTS.

- Implied Promises. The law never raises a promise where the evidence shows the parties intended none. The Aull Savings Bank v. Aull, 199.
- 2. Voluntary Association: contract: Personal Liability of Members. The members of a voluntary association of individuals, organized for educational purposes, which contracts for the services of a teacher, are personally liable for her wages, in the absence of any agreement or understanding of the parties to the contrary. Heath v. Goslin, 310.
- 8. Contract, construction. Defendant, bank, recovered judgment on its cashier's bond on which S., B. and plaintiff were sureties, and thereafter plaintiff paid part of judgment under an agreement with defendant that execution as to its residue should be staid as to him until the appeal taken by B. in the suit on the bond should be determined, and all lawful means be used to obtain the residue of the judgment from B., Held, in an action for breach of this contract, that on the affirmance of the judgment appealed from by B. the defendant was not bound to seek satisfaction for the residue of said judgment against the sureties on B.'s appeal bond before making the same out of plaintiff. Moll v. The Market Street Bank, 440.
- 4. Contract: taxes: Illegal collection. The county collector of St. Louis county illegally collected interest on taxes, and delivered the same to the county under a contract with the latter to hold it in trust until his right to collect had been judicially determined, pending which a separation of the county and the city of St. Louis was had, and the county paid the fund to the city, to be held on the

same trust. Held, that the city was liable therefor to the tax-payers, and that this was the case, notwithstanding there was a clause in the contract between the collector and the county, to the effect that the contract gave no tax-payer the right to sue the county for his share of said fund. Loring v. The City of St. Louis, 461.

- ADMINISTRATOR: PROMISE MADE TO, AFTER DECEDENT'S DEATH. An
 administrator can sue in his representative capacity on a promise
 made to him after the death of the decedent, for the benefit of the
 estate. Mosman v. Bender, 579.
- 6. ——: contracts by. Where an administrator, acting for the best interests of the estate, releases a levy of execution on land which is subject to a lien of a prior judgment in favor of a third person for more than its value, in consideration of a promise to him to pay one-half of the judgment due the estate, such contract is not unlawful, and may be enforced against the promisor. Ib.
- 7. EXECUTION OF CONTRACT, WHEN QUESTION FOR JURY. Where the evidence is conflicting upon the question of the execution of a contract, it should be submitted to the jury for determination. May v. Burk, 675.

SEE SALES.

CONTRIBUTORY NEGLIGENCE.

SEE NEGLIGENCE.

CONVERSION.

Conversion: Bailee: AGENT: NOTICE. A bailee or agent of another, who, after being apprised of the rights of the real owner, retains possession of property, or of the proceeds of its sale, and refuses to deliver the same to such owner, is guilty of conversion. And it matters not, in this regard, that it was difficult to distinguish the property converted by the bailee from other property, which he had in his possession, and with which that converted was intermingled. Dusky v. Rudder, 400.

SEE HUSBAND AND WIFE, 6.

CORPORATIONS.

Banking corporation: Power to Borrow Money: Cashier's authority. Where general banking powers are conferred by the charter of a banking corporation, the corporation may borrow money without having more specific authority therefor.
 In order to show a cashier's authority to borrow money for his

In order to show a cashier's authority to borrow money for his bank, it is not necessary to prove a power specially conferred upon him by the board of directors or a distinct ratification by them of the act after its consummation; his acts done in the ordinary course of the business actually confided to him as such cashier, are prima

facie evidence that they fall within the scope of his duty. Donnell v. The Lewis County Savings Bank, 165.

2. JUSTICES OF THE PEACE: APPEAL: CORPORATIONS: RESIDENCE. A corporation, although chartered in another state, which keeps in this State an office or agent for the transaction of its usual and custom-ary business, has a legal residence here in the county of such office or agent, and must prosecute its appeals from the judgment of a justice of the peace within ten days after rendition thereof. Harding v. The Chicago & Alton Railroad Company, 659.

COVENANTS AGAINST INCUMBRANCES.

SEE VENDOR AND VENDEE, 3.

CRIMINAL COSTS.

CRIMINAL COSTS: STATUTE. The State is not liable for the expense of boarding and lodging a jury incurred before the going into effect of the act of March 8th, 1883, (Laws, p. 80,) where, in the trial of a felony, it was not permitted to separate, and failed to agree on a verdict; and this is the case although the account for said expense was allowed and certified to the State Auditor by the trial judge and prosecuting attorney, after the going into effect of said act. The State ex rel. Allen v. Walker, 610.

CRIMINAL LAW.

- Druggist: Drinking Liquor on the Premises. The fact that liquor sold by a druggist is drunk by the purchaser on the premises, does not render the druggist liable to the penalties of this act, unless it is shown that the drinking was done with his knowledge and consent. State v. McAdoo, 216.
- 2. INDICTMENT: LARCENY: CATTLE. An indictment under section 1307, Revised Statutes 1879, for the larceny of neat cattle, is sufficient if it charges the theft of "certain cattle, to-wit, one steer," and the value need not be laid. The term "cattle" designed does done tic quadrupeds collectively, but the term "neat cattle" includes only cattle of the bovine species. A steer belongs to the class of neat cattle, and it would be sufficient to use the word "steer" without employing the term "cattle" or "neat cattle." The State v. Lawn, 241
- 8. STATUTORY CONSTRUCTION: LICENSE: DRUGGIST: MEDICATED BITTERS. Medicated bitters called "Dr. Wilson's Rocky Mountain Herb Bitters," and containing alcohol, are, within the prohibition of section one, acts of General Assembly of 1879, (Acts, p. 166,) (R. S., § 5472,) against dealers in drugs and medicines selling or giving away intoxicating liquors or medicated bitters containing alcohol, without having a dramshop keeper's license. The State v. Wilson, 303.
- 4. Nor can such dealer claim exemption in favor of his bitters under sec 3 of said act, (R. S., § 5474). The exemption 44-80

mentioned in that section refers to the use of liquors by a druggist in the admixture of necessary remedial compounds, as they are required in the ordinary business of a druggist, and not to an admixture which results in a compound popularly known as "bitters," and as such called for and used as an alcoholic beverage. Ib.

- 5. Criminal Law: embezzlement: agent: commissions. One who auctions off "pools" upon a horse race, and receives the money of the purchaser, and gives a receipt therefor, is the agent of such purchaser, and if he converts such money to his own use with intent to deprive the owner of its use and value, he is guilty of embezzlement, although the money was placed in his hands for an immoral purpose. But where such agent is to receive a per cent of the money bid and placed in his hands, such per cent should be deducted from the amount, and the offense will not be a felony if such deduction reduces it below \$30. The State v. Shadd, 358.
- 6. Assault with intent to RAPE: INDICTMENT. An indictment for an assault with intent to commit a rape, need not set forth the manner or means of the assault charged. The general averment that the assault was made with the intent to ravish, is all that is requisite, and the details as to the mode and means of the act, are matters of evidence. The State v. Smith, 516.
- 7. Assault: Attempt: Intent. An assault with intent may exist without an actual attempt. There need not be a direct attempt at violence, but indirect preparations toward it will, in certain circumstances, constitute an assault, and the intent to use force may be inferred from the circumstances. Ib.
- 8. False pretenses: sufficiency of evidence: venue. Defendant bought twenty-four mules of G., in Randolph county, for \$140 each, giving G. in payment for them \$80 in cash, and a draft on M. & J., of St. Louis, for the balance of \$3,248, representing to G. that he had the money in the hands of M. & J. with which to pay the draft, when in fact he had in their hands but \$69.60, less \$32, the freight on the mules. Defendant ordered the car for the shipment of the mules, directed them to be shipped in G.'s name, and at his request they were so shipped, and after the payment of the \$80 and giving the draft for the balance, defendant procured G. to sign a statement that he had bought the mules, and that they were his. Defendant went to St. Louis on the train with the mules, and on the day they arrived he sold them and ran off with the money. He exhibited to the purchaser and to the consignee the statement he had procured G. to sign, showing he had bought the mules, and that they were his. Held, that when defendant paid G. for the mules by giving him \$80 in cash, and a draft for the balance, he became invested with the property in them, and also their possession, that he was guilty of obtaining property by means of false representations, and that the venue of the offense was properly laid in Randolph county. The State v. Dennis, 589.
- CRIMINAL LAW: INFORMATION: CONSTITUTION. The general assembly
 has no power under the constitution, to authorize criminal prosecutions by informations in the form of an affidavit of a private person,
 in lieu of informations as understood at common law. Affirming
 State v. Keim, 79 Mo. 515. The State v. Briscoe, 643.

- 10. STATUTE: MANSLAUGHTER: INTENTIONAL KILLING. Where the killing is intentional, there can be no manslaughter in the third degree under Revised Statutes, section 1244, nor in the fourth degree under Revised Statutes, section 1249. The State v. Dunn, 681.
- 11. Manslaughter in fourth degree: statute. Where the evidence shows that the defendant was the aggressor, and provoked the difficulty which resulted in the homicide, and intentionally killed the deceased, there can be no manslaughter at common law, and consequently none in the fourth degree under Revised Statutes section 1250. *Ib.*

DAMAGES.

- Replevin, Value of Goods How Assessed: Damages. In an action of replevin, where the defendant claims the goods replevied and demands a return thereof, and the jury find in his favor, they should assess the value of the goods at the time of such assessment, and the damages, if any, sustained by defendant in consequence of the taking and detention. Pope v. Jenkins, 30 Mo. 528, followed; Woodburn v. Cogdal, 39 Mo. 228, and Miller v. Whitson, 40 Mo. 101, dis approved. Chapman v. Kerr, 158.
- 2. Cattle communicating disease: Damages. Before the owner of cattle running at large in this State, can be held liable for damages caused by disease communicated by them to other cattle, it must be shown that he knew his cattle were diseased; and this rule applies as well to Texas as to native stock. Bradford v. Floyd, 207.
- 3. CATTLE RUNNING AT LARGE: DAMAGES. At common law it was the duty of every man to keep his cattle within his own inclosure. Failing to do so, he was liable for their trespasses upon the lands of others; and for any injury resulting from disease communicated by them, without regard to the question whether he was personally at fault, he was as much bound as if he had voluntarily permitted them to go at large. But in this State, in the absence of special stock laws, the common range is regarded as common property for the purposes of herding. The owner is not liable in damages for trespasses committed upon his neighbor's premises, except by breaking his lawful inclosure. Ib.
- 4. JUDGMENT, RECOVERY OF DAMAGES PAID UNDER. Recovery cannot be had by plaintiff, against defendant, for damages paid by him to defendant, under a judgment against plaintiff and in favor of defendant, nor for attorney's fees and costs incurred by plaintiff in the suit, so long as such judgment stands unreversed. Attison v. Henry, 670.

SEE NEGLIGENCE, 7, 8.

DEED.

Deed: consideration clause: Parol evidence. It is true that a
reservation of an interest in real estate can only be made by deed;
but if the parties agree that the grantor may continue to use the

premises and he does so, this may be shown by parol in bar of an action for use and occupation. The Aull Savings Bank v. Aull, 199.

- consideration clause: Parol evidence. Where the grantor in a deed continued, after its execution and delivery, to use a part-of the premises conveyed; Held, that parol evidence was admissible to show that this was part of the bargain; its effect was not to contradict the deed, but to explain the consideration clause, which is allowable. Ib.
- 3. Sheriff's dred: advertisement: Clerical mistake: evidence. A clerical mistake in an advertisement of sale of real estate by the sheriff, is insufficient to contradict the recitals in the sheriff's deed, which are by statute made evidence of the facts stated. R. S. 1855, § 56, p. 748; R. S. 1879, § 2392. Irregularities in the advertisement will not invalidate the title of bona fide purchasers who had no notice of such irregularities and no part in their commission. Mitchell v. Nodaway County, 257.
- 4. Insane person, deed of. The deed of an insane person, after being placed under guardianship, will be absolutely void; and guardianship is conclusive respecting the disability of the ward, whether he be insane or not. And it is immaterial from what cause his in sanity resulted, whether from old age, sickness, habitual drunkenness or other causes whatever. Rannells v. Gerner, 474.
- assent of guardian. The assent of the guardian of an insane person to the latter's deed, confers upon that instrument no element of validity. Ib.
- 6. Insane person, disposition of real estate of. The provisions of the statute for the disposition of the real estate of insane persons, (Wag. Stat., pp. 714, 715, 22 19 to 29, inclusive,) are exclusive of every other method. The proceedings are in rem, binding and affecting no person, except so far as they deprive the owner of his land. Ib.
- 7. ——: EVIDENCE OF LUCID INTERVAL: DEED OF. No evidence of a lucid interval is admissible to controvert the insanity of a person after being placed in ward, and non est factum may be pleaded to his deed made after being placed under guardianship and the special matter given in evidence. Ib.
- ALIEN: DESCENT: STATUTE. Under Revised Statutes 1879, section 325, an alien may take real estate by descent from an alien. Burke v. Adams, 504.
- 9. Deed, recording: when a delivery. A deed with a receipt of the purchase money expressed therein and executed, acknowledged and placed on record by the grantor, is evidence of the latter's intent to pass title to the grantee, and these acts constitute such evidence of a delivery of the deed as to impose the burden upon the grantor and his privies to show, by clear countervailing proof, that a delivery was not intended. Ib.

DEEDS OF TRUST.

SER MORTGAGES AND DEEDS OF TRUST.

DEPOSITIONS.

- 1. Depositions, when entitled to be read. A deposition taken pursuant to a stipulation that it should be read on the trial of the cause, subject to all objections on the grounds of irrelevancy, illegality and incompetency, may be read in evidence, although the witness at the time of the trial is within the jurisdiction of the court. Chapman v. Kerr., 158.
- Deposition of Party: Admissibility of. The deposition of a party to the cause as a written statement of facts, is admissible in evidence, although he be present to testify, or has testified. The State ex rel. Goldsoll v. The Chatham National Bank, 626.

SEE EVIDENCE, 18.

DIVORCE.

DIVORCE: ALIMONY. A woman can have permanent alimony in this State only as incident to a decree of divorce in her favor. McIntire v. McIntire, 470.

DOWER.

MARRIED WOMAN: DOWER. A married woman can relinquish her dower in the real estate of her husband, only by "their joint deed, acknowledged and certified" as provided by statute. R. S. 1879, § 669, 2197. And the wife of an insane person does not relinquish her dower in the land of her husband, sold by his guardian, by joining with her husband in signing the deed thereto. Such deed, so far as the husband's execution of it is concerned, has no legal existence or vitality, he not being the possessor of a sound mind and capable of contracting. Rannells v. Gerner, 474.

DRAMSHOP LICENSE.

Dramshop License, Petition for Signers: Statute. Under Revised Statutes of 1879, sections 5438, 5442, as amended by the act of the general assembly of March 24th, 1883, (Acts, pp. 87, 88,) the petition for a dramshop license, where the dramshop is to be kept in a block or square of a city containing 2,500 inhabitants or more, signed by two-thirds of the assessed tax-paying citizens of said block or square, is sufficient in respect to such signers, and the law being otherwise complied with by the applicant for the license, it is obligatory on the county court to issue it. The State ex rel. Fitzpatrick v. Meyers,

DRUGGIST.

SEE CRIMINAL LAW.

PLEADING CRIMINAL

EJECTMENT.

- 1. Description of Land: Ejectment: Petition: Verdict: writ of possession. A petition in ejectment to recover a strip of land lying on the dividing line between plaintiff and defendant, described the strip as "the south half of the south half of the southwest quarter of the northwest quarter of section 24, township 50, range 21, in Saline county." The verdict was, "We, the jury, find for plaintiff and designate a line" (describing it) "as the true line between plaintiff and defendant." and the judgment followed the verdict. Held, that the description in the petition was sufficient; that the verdict might have stopped at a finding for the plaintiff, but was not vitiated by the explanatory matter referring to the dividing line; and that a writ of possession based on this verdict and judgment sufficiently informed the officer executing it what land it was his duty to place the plaintiff in possession of. Lemmon v. Hartsook, 13.
- 2. JURISDITION: EJECTMENT: VENUE. Where an appeal in an ejectment suit is taken from one county, the land in controversy being situated in another, and the record fails to show how the circuit court of such former county acquired jurisdiction, the judgment will be reversed. The circuit court of the former county could only acquire jurisdiction by a change of venue ordered by the circuit court of the latter. Snitjer v. Downing, 586.
- 3. EJECTMENT: POSSESSION: MESNE PROFITS. Both at common law and under statutes regulating the action of ejectment and allowing a recovery therein for waste and injury and mesne profits, the plaintiff must first establish his right to the possession during the period for which he claims rents and profits, before he can recover them for such period. Alkison v. Henry, 670.

EMBEZZLEMENT.

EMBEZZLEMENT BY TOWNSHIP TRUSTEE. Section 41 of article 3 chapter 42 of Wagner's Statutes, providing for the punishment of officers converting to their own use the public money, embraces township trustees. The State v. Cleveland, 108.

EQUITY.

1. Equity; void deed no cloud on title: Change of venue. In an action against several defendants, originating in Hickory county, some of the defendants applied for a change of venue, and the court ordered a change, as to them, to Pettis county. The court in Pettis county afterward rendered judgment against one of the defendants who had not joined in the application for the change, and who

never appeared to the action and was served only by publication; and his land was sold to satisfy the judgment. In a suit brought by this party to set aside the sheriff's deed, these facts, among others, appearing in the petition; *Held*, that the petition was bad on demurrer; that the court in Pettis county obtained no jurisdiction of this party; that the judgment was, therefore, a nullity as against him, and the deed was void, and so there was nothing upon which a court of equity could act. *Holland v. Johnson*, 34.

2. ——: CONVEYANCE, WHEN SET ASIDE: MISTAKE: FRAUD. Where the grantee in a deed represented she was seeking only a life estate in certain land, and presented to the grantor, her daughter, a deed to be executed therefor, and the latter made the deed under the belief that she was conveying a life estate, when in fact it conveyed an absolute estate in fee simple; Held, that whether the transaction was one of mutual mistake or of fraudulent misrepresention on the part of the grantee, equity will set aside the conveyance. Summers v. Coleman, 488.

SEE HUSBAND AND WIFE.

ESTOPPEL.

1. Division Lines fixed by act of parties: Estoppel. Where one of two adjoining proprietors, for the purpose of enabling the other to locate a division fence, pointed out a line as the true dividing line between them, and the latter, relying upon this information, built the fence and made other improvements up to this line; Held, that as against him a grantee of the former proprietor was estopped to deny that this was the true line.

But where the parties agreed upon a line, neither knowing the true line and each intending to fix upon it, and each acting on the best information he could get and not relying wholly on the other; *Held*, that there was no estoppel. *Lemmon v. Hartsook*, 13.

- Personal judgments: who concluded. Personal judgments conclude only parties and their privies, and cannot be invoked by strangers nor pleaded by them. Quigley v. Mexico Southern Bank, 289.
- Estoppels in pais are not applicable to femmes covert, except where regarded as femmes sole in consequence of the possession of separate estates. Rannells v. Gerner, 474.
- 4. OFFICER: SALARY: PRESUMPTION: ESTOPPEL. An officer of a city government must be presumed to have knowledge of the ordinances or orders establishing and continuing his salary, and where the city has paid him the salary it regarded as due him, and he has received it as such, he is estopped from claiming more. Galbreath v. The City of Moberly, 484.
- ESTOPPEL IN PAIS: MINOR. An estoppel in pais cannot be asserted against a minor. Burke v. Adams, 504.
- 6. ——: WHAT NECESSARY TO. Nor can an estopped in pais be invoked where the party sought to be estopped was not apprized of his rights nor unless the act of the party relied on as an estoppel, was pone

with the intent that the other party should act upon it, and the latter was induced thereby to change his relation to the subject matter thereof to his injury. Ib.

7. ESTOPPEL: ADMISSIONS. An admission made by one party to another, is not sufficient to create an estoppel in pais, unless the party to whom it was made acted upon it. The party claiming the benefit of the admission must show that his action was influenced by it, before he can set it up, or rely upon it. Monks v. Belden, 639,

EVIDENCE.

- 1. EVIDENCE IN EJECTMENT: DECLARATIONS OF GRANTOR OF A PARTY. In ejectment for a strip of land lying on the dividing line between plaintiff and defendant, defendant had offered evidence of acts and declarations of plaintiff's grantor, since deceased, tending to fix the line as claimed by defendant. Plaintiff, in rebuttal, offered evidence of declarations to the contrary made by his grantor while in possession. Held, that this latter evidence was competent. Lemmon v. Hartsook, 13.
- 2. LARCENY: EVIDENCE OF PRISONER'S POSSESSION OF BURGLARS' TOOLS. On a trial for larceny from a dwelling-house, it appeared that defendant was arrested in the vicinity of the locus delicti immediately after the commission of the larceny, under suspicious circumstances tending to connect him with the crime. It also appeared that divers rooms, closets and drawers in the house were ransacked; but there was no evidence that burglars' tools had been used to effect the entry or to open inner doors or drawers. Held, that evidence that the defendant, when arrested, had such tools in his possession was nevertheless admissible. The State v. Davis, 53.
- 3. Dying declarations. To be admissible in evidence, dying declarations must relate to the identification of the prisoner or the deceased, or to the act of killing or to the circumstances attending the act and forming part of the res gestae. Hence, where the declaration was: "I believed he (defendant) was going after his pistol when he went into the house. I had seen him at the house with a pistol before;" Held, that this ought to have been excluded. The State v. Vansant, 67.
- Dying declarations are in their nature secondary evidence, and are so regarded in the law. It is, therefore, error to instruct a jury to give them the same weight they would if the declarant had testified before them. Ib.
- 5. Homicide: Evidence. On a trial for murder the State gave evidence that the defendant attempted to cut the deceased (his wife) with a knife during the night preceding the day of the homicide, and further showed, against the objection of defendant, that on the morning of the homicide the deceased exhibited a cut in her dress to a witness, and that the cut had the appearance of having been made with a knife. Held, that there was no error in admitting this latter evidence. The State v. Lewis, 110.

- 6. WITNESS: EVIDENCE OF CONVICTION. When parol evidence is objected to, the record must be produced to prove the conviction of a witness. Another witness will not be allowed to testify that he saw the first in the penitentiary as a convict. This is true equally whether the testimony is offered to affect his competency or his credibility. Ib.
- 7. The probate of a will is a judicial proceeding, and when made in another state a copy properly authenticated under the laws of the United States, is to be received in evidence in the courts of this State under section 1, article 4 of the Constitution of the United States. Keith v. Keith, 125.
- 8. Sale or consignment: Evidence. Plaintiffs made sundry shipments of goods to defendants, and with them in each case sent bills in the form of ordinary merchants' bills of sale. Held, that if nothing appeared to the contrary, the jury were warranted in finding that the goods were sold, and that they could not find that they were consigned unless there was contradictory evidence clearly preponderating. Chapman v. Kerr, 158.
- a sale of goods, furnished by a bill accompanying the delivery thereof in the form an ordinary sales bill, it is not necessary to prove that such goods were received and accepted as a consignment if, pursuant to agreement, consigned for sale. *Ib*.
- 10. ——. DEPOSITIONS, WHEN ENTITLED TO BE READ. A deposition taken pursuant to a stipulation that it should be read on the trial of the cause, subject to all objections on the grounds of irrelevancy, illegality and incompetency, may be read in evidence, although the witness at the time of the trial is within the jurisdiction of the court. Ib.
- 11. AGENT'S DECLARATIONS AND VERBAL ACTS. The declarations of an agent are admissible as evidence against his principal only when made while transacting the business of the principal and as a part of the transaction which is the subject of inquiry. Hence, where the baggage-master of a railroad company, while away from the baggage-room of the company and engaged in the transaction of his private business on his own premises, gave directions to a stranger with reference to the delivery of baggage; Held, that they were not binding on the company. City of Chillicothe ex rel. v. Raynard, 185.
- 12. Tax books. The books in the collector's office are not records within the rule in Vance v. Corrigan, 78 Mo. 94, so that if the name of the defendant in the tax suit appears on those books as owning the land, he is to be regarded as the record owner. Watt v. Donnell, 195.
- 13. Dred: consideration clause: Parol Evidence. It is true that a reservation of an interest in real estate can only be made by deed; but if the parties agree that the grantor may continue to use the premises and he does so, this may be shown by parol in bar of an action for use and occupation. The Aull Savings Bank v. Aull, 199.

- 14. Transportation contract: action: Negligence: evidence. In an action for a negligent breach of a contract to transport cattle, the petition alleged as acts of negligence on the part of the railroad company, defendant: (1) That it had had the cattle loaded into an unsafe car, so that they had to be taken out and loaded into an other: (2) That the loading into this car had been negligently done. By the contract the plaintiff had expressly agreed to load and unload at his own risk. At the trial he gave evidence that the car into which the cattle were transferred was not provided with proper bedding. Held, that this evidence was incompetent, because: (1) If bedding the cattle was embraced in the term "loading," the plaintiff had assumed the risk of this; (2) If it was not, then the negligence shown did not fall within the allegations of the petition. Alchison v. The Chicago, Rock Island & Pacific Railway Company, 213
- Negligence: evidence. In an action grounded on negligence, and alleging specific acts of negligence, evidence of other acts is inadmissible. Ib.
- 16. RAILROAD: NEGLECT TO FENCE: EVIDENCE. Direct evidence that stock passed through a defective place in the fence, is not required to sustain an action against a railroad for double damages for injuries to the stock, occasioned by the escape of the latter on the roadway at a place where defendant neglected to maintain a lawful fence. Gee v. The St. Louis, Iron Mountain & Southern Railway Company, 283.
- 17. EVIDENCE: ATTACHMENT WRIT: DEFECTS IN. In a suit by attaching creditors to set aside a fraudulent mortgage, the writ of attachment sued out pendente lite in term time without order of court, and although not made returnable to any court, term or day, is admissible in evidence to show that plaintiffs were attaching creditors in the attachment suit; the latter suit having been commenced with personal service with which defendants were served. Donnell v. Byern, 332.
- 18. Lost deposition. Certified copy from supreme court. On the re-trial of a cause which had been reversed and remanded by the Supreme Court, a certified copy of a deposition made from the transcript of the record in the latter court, was properly admitted in evidence, it being shown that the original was lost, and also that it had been correctly copied and forwarded to the Supreme Court in the transcript, to which it belonged. Ib.
- 19. EVIDENCE: REBUTTAL: ADMITTING EVIDENCE OUT OF ITS ORDER. Evidence proper to be offered in chief, should not be admitted under the semblance of evidence in rebuttal, and while trial courts have a discretion in admitting evidence out of its regular order, such discretion is not an arbitrary one, but is judicial in its character and only to be exercised in the furtherance of justice. Christal v. Craig. 367.
- 20. SLANDER: EVIDENCE. Proof of the repetition of the slander alleged, after the time of the utterance, may be given in aggravation of damages as showing the quo animo, but evidence which is neither within the allegations of the petition nor rebuttal in its character, is not admissible. Ib.

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- 21. EVIDENCE. Where the replication simply denies the allegations in the answer of a final settlement, the evidence will be confined to the issues thus made. Galbreath v. The City of Moberly, 484.
- 22. Husband and wife: evidence. In a contest between a wife and the husband's creditors, the latter, who asserted that the property in dispute was his, and not her separate estate, offered evidence to show that the husband had assessed the property in his own name, and also that he had taken out in his own name a fire insurance policy thereon. There was no evidence tending to show that this was done with the knowledge or consent of the wife; Held, that the evidence was incompetent to prove that any part of her separate estate had been relinquished by her, but was competent for the purpose of repelling the establishment of a separate estate in her as to any gift or acquisition from which his marital rights had not been excluded. The State ex rel. Goldsoll v. The Chatham National Bank, 626.
- 23. Deposition of party: admissibility of. The deposition of a party to the cause as a written statement of facts, is admissible in evidence, although he be present to testify, or has testified. *Ib*.

SEE ASSIGNMENT, 3.

PERSONAL PROPERTY.

MUNICIPAL CORPORATIONS.

EXECUTIONS.

EXECUTION: REPLEVIN OF PROPERTY LEVIED ON: SECOND EXECUTION. An execution was levied on personal property of the defendant sufficient to satisfy it. Before sale the property was taken out of the hands of the officer by replevin at the suit of a person who claimed it by purchase from the defendant after the levy. Thereupon a second execution was issued and a levy and sale were made thereunder. In an action against the officer making them; Held, that such a purchaser could not maintain replevin, that the property therefore remained in custodia legis and operated sub modo as a satisfaction of the first execution, and that the issuing of the second and the levy and sale under it were therefore unlawful, and the officer was liable accordingly. The State ex rel. Colvin v. Six, 61.

FALSE PRETENSES.

- An indictment for obtaining money under false pretenses which set out such pretenses, negatived their truth and further alleged "all of which the defendant then and there well knew," Held, after verdict, not to be obnoxious to the objection that the scienter was not sufficiently averred. The State v. Janson, 97.
- An indictment for obtaining money under false pretenses which alleged that defendant had falsely stated that he was about to ship, and had shipped, certain goods, and that upon the faith of the com-

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ing thereof he obtained the money in question, *Held*, not obnoxious to the objection that it set out the representation of a future event merely. *Ib*.

SEE CRIMINAL LAW, 8.

FALSE REPRESENTATIONS.

Fraudulent representations: MISTAKE: SCIENTER. To support a personal action for fraudulent representations, it is not sufficient to show that the party making them did not know them to be true, and that they were, in fact, false; there must be fraud as distinguished from mere mistake. But, if the party state material facts, as of his own knowledge, of which he knows nothing whatever, and not as matter of opinion, such willful statement in ignorance of the truth is the same as the statement of a known falsehood, and will constitute a scienter. Walsh v. Morse, 568.

FENCES.

SEE RAILROADS.

FIXTURES.

FIXTURES: SEVERANCE. The owner of land has the right to sever fixtures from the freehold, and they may be severed and lose their character as fixtures by accident. The State ex rel. Davis v. Goodnow, 271.

FRAUD.

- Assignment: Possession: Fraud. Retention of possession of personal property by the assignor after assignment for benefit of creditors, is not per se fraudulent, and does not render the assignment void. Goodwin v. Kerr, 276.
- FRAUDULENT CONVEYANCE: CREDITORS. In a suit to set aside a fraudulent conveyance, defendants cannot set up as a defense fraud upon creditors who are strangers to the record. Steadman v. Hayes, 319.
- MORTGAGE: TITLE. The mortgagee in a mortgage, executed to secure a bona fide indebtedness, is a purchaser in good faith, and acquires the legal title of the mortgageor. Ib.
- 4. Fraud: Equity. In a proceeding to set aside a fraudulent conveyance, the controlling question is, whether there was fraud in the transaction which would warrant a court of equity in setting it aside. Ib.

- Conveyance: Fraud: existing creditors. A conveyance cannot be claimed to be fraudulent as to existing creditors, except by such creditors. Burks v. Adams, 504.
- FRAUD: CREDITORS. Although a debtor has been overreached and defrauded in a business transaction, this is not a matter of which his creditors can take advantage. Colbern v. Robinson, 541.
- SECURITY: FRAUD. The mere fact that the security given to secure a note is more than is necessary, is, of itself, no indication of fraud. B.

SEE EQUITY.

FRAUDULENT CONVEYANCES.

SEE FRAUD.

GARNISHMENT.

- 1. Garnishment: Service on Railroad companies. To make a valid garnishment of a railroad company under the proviso to section 2521, Revised Statutes 1879, the notice must be delivered to "the nearest station or freight agent" of the company, and the officer's return must so describe the person to whom it is delivered. A return describing him as the "nearest agent" is insufficient. Haley v. The Hannibal & St. Joseph Railroad Company, 112.
- 2. ——: BANK, DEPOSIT. Money deposited in bank to the credit of the depositor as "Supt." is liable to garnishment as a debt due the execution defendant, it appearing that the depositor was the latter's superintendent and that the money belonged to it. Gregg v. The Farmers & Merchants' Bank of Hannibal, Garnishee, 251.

GUARDIAN.

- GUARDIAN OF INSANE PERSON: ESTATE, AUTHORITY AS TO. A guardian of an insane person has no authority to subject the estate in his charge, to the risks and hazards of any trade or business undertaking. Michael v. Locke, 548.
- 2. ——: STATUTE: PROBATE COURT. Such power is not conferred on the guardian by statute, nor have the probate courts the equitable jurisdiction to give it. Ib.

HOMESTEAD.

Homestead: conveyance by widow: Minor children. Under section 5, Wagner's Statutes, page 698, notwithstanding the sale and conveyance of the homestead by the widow, the minor children, until they maintain their majority, are entitled to its exclusive possession as against her vendee. Roberts v. Ware, 363.

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HOMICIDE.

- Homicide. A series of instructions on the law of homicide, including self-defense, approved. The State v. Vansant, 67.
- 2. Homicide: Evidence. On a trial for murder the State gave evidence that the defendant attempted to cut the deceased (his wife) with a knife during the night preceding the day of the homicide, and further showed, against the objection of defendant, that on the morning of the homicide the deceased exhibited a cut in her dress to a witness, and that the cut had the appearance of having been made with a knife. Held, that there was no error in admitting this latter evidence. The State v. Lewis, 110.

SEE CRIMINAL LAW.

HUSBAND AND WIFE.

- MARRIED WOMAN'S PERSONAL PROPERTY. Irrespective of statute, courts of law as well as equity now recognize the doctrine that personalty may be the absolute property of the wife under certain conditions. McCoy v. Hyatt, 130.
- EVIDENCE. The separate title of the wife to personalty may
 be established by words, acts and conduct as well as by writing;
 and where the proof of her ownership is clear, the fact that her
 husband is indebted does not affect her right. Ib.
- 3. ——: WIFE'S POSSESSION AND CONTROL. Long and uninterrupted control over personal property by the wife with the husband's acquiescence is presumptive evidence of her ownership against the creditors of her husband, where such property has not been mingled with his nor used by him so as to create a credit based upon his apparent ownership. Ib.
- 4. ——: THE ACT OF 1875. The married woman's act of 1875, (now § 3296, R. S. 1879,) in nowise interfered with the right of married women to acquire, or the manner in which they might acquire a separate estate in personalty by gift or purchase, as it previously existed. The act was designed to enlarge the operation of the right, to simplify the proof of the existence of the estate, and to afford protection especially against the effects of the husband's reducing the property to possession, by providing that no such reduction should be effectual, unless evidenced by writing signed by her. Ib.
- PURCHASES BY MARRIED WOMAN. The purchases of a married woman protected by that act are those made with her separate money or means, and those only. Ib.
- 6. ——: GIFTS TO HER: MIXED PURCHASE AND GIFT: CONVERSION. The act protects gifts as well as purchases; and where a married woman, by her pleading claimed property by virtue both of gift and purchase, and there was evidence tending to show that she acquired it in consideration partly of love and affection and partly of money paid; Held, that it was error so to instruct the jury as to permit a

verdict for her only in case they found the money paid was her separate means. She might fail to show this, and consequently so far as the acquisition was a purchase it might be without the pale of the act, and yet so far as it was a gift, be protected; and the possible difficulty of ascertaining the exact extent of her interest would not warrant the court in withholding the question from the jury. Held, also, that where a married woman had such an undivided interest, if a person claiming through her husband appropriated the property to his exclusive use and denied her right altogether, that was in law a conversion, and entitled her to maintain an action against him, as in trover, for damages, to recover her interest. Ib.

- 7. Husband and wife's joint estate in land, conveyance of: title bond: equity. Where husband and wife are seized in entirety, the husband may, without joining his wife, convey his legal or equitable estate, subject to her right of survivorship. But, where the husband alone executed a title bond for such land, Held, that the wife's estate could not be divested by reason thereof, although she afterward received from her husband part of the purchase money and thereupon expressed satisfaction with the sale. Atkison v. Henry, 151.
- 8. Married woman: Mistake in her deed cannot be reformed. As against a married woman a court of equity has no power to compel specific performance, to reform a deed, or to do anything else which will divest title to land out of her. Hence, where there were two deeds of trust executed by husband and wife, and both intended to cover the same land, but by mistake the earlier deed described a different tract, and because the holder of the later deed had notice of the mistake the court decreed that the first deed should be reformed and enforced as a first lien against the true land; Held, that this decree was correct so far as it related to the husband's interest, but erroneous so far as it related to the wife's, and as to her interest the second deed must remain the first lien. Meier v. Blume, 179.
- 9. —: HER PERSONAL CHATTELS. Prior to the act of 1875, (R. S., § 3296,) personal chattels of the wife vested absolutely in the husband, and became subject to his debts. Alexander v. Lydick, 341.
- 10. ——: STATUTORY CONSTRUCTION: REVISED STATUTES, SECTION 3296. A sewing machine purchased by the wife in 1876, in part with the proceeds of a colt belonging to her husband, and in part with the products of her farm, held not to have been acquired "with her separate money or means," so as to give her an independent title thereto, within the provision of the acts of 1875. R. S., § 3296. Ib.
- 11. Revised statutes, section 3296: Necessaries for family. Medical services rendered the family are within the provisions of R. S., section 3295, subjecting her property to attachment and execution for debts and liabilities created by the husband for necessaries for the wife and family. Ib.
- 12. Husband and wife: Gift by Husband: Insufficient evidence of. On an examination of the evidence, *Held*, that it failed to show a complete and perfected gift to the wife, by the husband, of certain property, as claimed by her. *Ib*.

- 13. Married woman: General Judgment against: her contracts and torts: Liability for. A married woman is not liable on her contracts made during coverture, and no personal judgment can be rendered against her on account of them. She, however, is liable conjointly with her husband for torts committed during coverture, and a general judgment against her and her husband can be rendered therefor; but this liability relates only to such torts as she may have committed out of his presence, and without his order or consent; otherwise he is liable alone for them, and she is exempt, upon the presumption of being induced to commit them under his coercion. Ib.
- 14. ——: REPLEVIN BOND: GENERAL JUDGMENT: SURETIES. While a general judgment cannot be rendered against a married woman on a replevin bond, yet it can be rendered against her co-principal and sureties, who are legally liable thereon. Ib.
- 15. Married woman: Dower. A married woman can relinquish her dower in the real estate of her husband, only by "their joint deed, acknowledged and certified" as provided by statute. R. S. 1879, §§ 669, 2197. And the wife of an insane person does not relinquish her dower in the land of her husband, sold by his guardian, by joining with her husband in signing the deed thereto. Such deed, so far as the husband's execution of it is concerned, has no legal existence or vitality, he not being the possessor of a sound mind and capable of contracting. Rannells v. Gerner, 474.
- : ESTOPPEL. Estoppels in pais are not applicable to femmes
 covert, except where regarded as femmes sole in consequence of the
 possession of separate estates. Ib.
- 17. Husband and wife: separate estate. Personal chattels brought to this State from a foreign country, and being when so brought the separate estate of the wife, continue to remain her separate estate here, irrespective of her husband's consent, until divested of that character by her acts. The State ex rel. Goldsoll v. The Chatham National Bank, 626.

INDICTMENT.

SEE PLEADING CRIMINAL,

INFORMATION.

SEE PLEADING CRIMINAL.

INJUNCTION.

SEE PARTNERSHIP, 2.

INSANE PERSONS.

- 1. The State Lunatic asylum: Pay Patients: County Patients. It is notessential to the validity of an order of the county court. making a pay patient in the State Lunatic Asylum a county patient, that there should be an express finding that the patient has not sufficient estate to support him; this will be presumed. An order that a patient already in the asylum "became a county patient at the lunatic asylum from this date," without more, will bind the county for his support there. The State ex rel. Yarnell v. The Cole County Court, 80.
- ; INQUEST OF LUNACY. The validity of such an order cannot be affected by proof of irregularities in the inquest of lunacy which took place before he was sent to the asylum. Ib.
- 3. ——: INSANE FOOR CRIMINALS. A citizen of Cole county, confined in the State Asylum as a county patient of that county, escaped and went to Moniteau county, and there committed a homicide, for which he was tried and acquitted on the ground of insanity, and in accordance with the statute was remanded bythe circuit court to the custody of the sheriff, to be held at the expense of the proper county until the county court should cause him to be removed to the asylum. Held, that under the statute, (R. S. 1879, §§ 4153, 4145, 4143,) this man remained the county patient of Cole county; that Cole county was the "proper county" to pay the expenses of his confinement, and that it was the duty of the county court of that county to cause him to be removed to the asylum. Ib.
- GUARDIAN OF INSANE PERSON: ESTATE, AUTHORITY AS TO. A guardian of an insane person has no authority to subject the estate in his charge, to the risks and hazards of any trade or business undertaking. Michael v. Locke, 548.

INSTRUCTIONS.

- Homicide. A series of instructions on the law of homicide, including self-defense, approved. The State v. Vansant, 67.
- 2. Instructions. Where there is no evidence upon which to base an instruction, it is properly refused. The State v. Gerber, 94.
- 3. ——: REPETITION. The trial court commits no error in refusing to give an instruction which is substantially the same as one already given. Harris v. Lee, 420.

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- 4. ——. Where there is a conviction for a higher offense, a defendant cannot complain of an instruction authorizing a conviction for a lower. And it is not error to refuse instructions when those given fairly present the case to the jury. The State v. Smith, 516.
- 5. Condemnation proceedings: evidence: instructions. The city charter provided, in reference to proceedings to condemn property for street purposes, that "parties interested may submit proof to the jury, and the latter shall examine, personally, the property to be taken and assessed;" Held, that an instruction was erroneous which told the jury that in assessing the value of the property, they might wholly disregard the evidence offered, and make their finding from their own observation alone. The City of Kansus v. Hill, 523.
- Instructions. An instruction which is wholly unintelligible, is properly refused. Greer v. St. Louis, Iron Mountain & Southern Railway Company, 555.
- It is not error to give an instruction when there is any evidence upon which to base it. Walsh v. Morse, 568.
- 8. Practick: Instructions. Instructions based on a defense not raised by the answer, or on facts stated therein not constituting a defense are properly refused. *Mosman v. Bender*, 579.
- Practice civil: Instructions. Instructions should be predicated on the whole evidence, and present, for the consideration of the jury, the different aspects of the questions at issue, as shown by the pleadings and evidence. Mansur v. Botts, 651.
- 10. Practice criminal: Harmless instructions. A defendant cannot complain of the giving of an instruction as to a grade of manslaughter, of which he was not convicted, even though the instruction was erroneous. The State v. Dunn, 681.

SEE PRACTICE IN SUPREME COURT, 6.

RAILROADS, 9.

JUDGMENTS.

- Personal judgments: who concluded. Personal judgments conclude only parties and their privies, and cannot be invoked by strangers nor pleaded by them. Quigley v. Mexico Southern Bank, 289.
- 2. Several counts: Verdict on one. Where the petition contains several counts, and all of them are submitted to the jury, who return a verdict for plaintiff on a specified one, this is an implied finding for defendant on the other counts, and the judgment will be a bar to any subsequent suit on the demands contained in the counts not named in the verdict. Hoyle v. Farquharson, 377.
- 3. JUDGMENT, RECOVERY OF DAMAGES PAID UNDER. Recovery cannot be had by plaintiff, against defendant, for damages paid by him to

defendant, under a judgment against plaintiff and in favor of defendant, nor for attorney's fees and costs incurred by plaintiff in the suit, so long as such judgment stands unreversed. Atkison v. Henry, 670.

JUDICIAL NOTICE.

- 1. Township organization: Judicial notice: Indictment. Judicial notice is not taken of the fact that a county has adopted township organization. Unless such be the fact, there is no such office as that of township trustee. It is, therefore, essential that such fact be alleged in an indictment under section 41 of article 3, chapter 42 of Wagner's Statutes, against a township trustee for converting to his own use the public moneys of the township. See City of Hopkins v. Railway Co., 79 Mo. 98. The State v. Cleveland, 108.
- 2. Texas cattle: Judicial notice. The courts will not take judicial notice of the supposed fact that during a particular season of the year what are known as Texas cattle have some contagious or infectious disease, communicable to native cattle by contact. If this be a fact, it must be made the subject of proof. Bradford v. Floyd, 207.

JURISDICTION.

- JURISDICTION: EJECTMENT: VENUE. Where an appeal in an ejectment suit is taken from one county, the land in controversy being situated in another, and the record fails to show how the circuit court of such former county acquired jurisdiction, the judgment will be reversed. The circuit court of the former county could only acquire jurisdiction by a change of venue ordered by the circuit court of the latter. Snitjer v. Downing, 586.
- 2. Justices of the peace: Jubisdiction, want of. Justices of the peace have no jurisdiction of causes in which both plaintiff and defendant are non-residents of the county in which the action is brought. (R. S., § 2839,) nor do the suing out and service by defendant of subpenas for witnesses, and the filing of a motion by him to rule the plaintiff to security for costs before moving to dismiss for want of jurisdiction, constitute such an appearance as to confer jurisdiction on the justice. Smith v. Simpson, 634.
- Semble, that consent even could not give jurisdiction in such a case. Ib.
- CRIMINAL LAW: INFORMATION: CONSTITUTION. The general assembly
 has no power under the constitution, to authorize criminal prosecutions by informations in the form of an affidavit of a private person,
 in lieu of informations as understood at common law. Affirming
 State v. Kelm, 79 Mo. 515. The State v. Briscoe, 643.

SEE RAILROADS, 4, 6, 10.

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JURY.

- Condemnation of Property for Street Purposes: Charter: Jury. A jury of six men, freeholders of the City of Kansas, as provided for in the charter of said city, is a competent jury to try an appeal from the mayor to the circuit court, in a proceeding under the charter to condemn private property for the purposes of street extension. The City of Kansas v. Hill, 523.
- 2. JUBORS, COMPETENCY; QUESTION OF FACT: REVIEW OF. The decision of a trial court in accepting or rejecting a juror, is the decision of a question of fact under the law; and it becomes the duty of such court to decide it like any other question of fact, and its decision ought not to be disturbed in the appellate court, if supported by evidence, because the seeming weight of evidence may be the other way. The State ex rel. Goldsoll v. The Chatham National Bank, 626.

JUSTICES' COURTS.

- Justices of the Peace. A justice of the peace has no authority to do an official act beyond the limits of his own county. An application for a change of venue sworn to before a justice outside of his county is, therefore, not verified by affidavit. Grayson v. Weddle, 39.
- JUSTICES' COURTS: CHANGE OF VENUE: JUDGMENT. A judgment entered by a justice of the peace after a change of venue has been applied for, in due form, is erroneous, but cannot be treated as a nullity in a collateral proceeding. The State ex rel. Colvin v. Six, 61.
- 3. RAILROADS: KILLING STOCK: JUSTICE'S JURISDICTION. In determining whether the justice of the peace, before whom a suit under the 43rd section of the Railroad Law has been brought, is of the township where the cattle were killed, this court is not confined to the plaintiff's statement of his cause of action, but may look as well to the justice's transcript. Fields v. The Wabash, St. Louis & Pacific Railway Company, 203.
- 4. ——: KILLING STOCK: JURISDICTION. On an appeal from a justice of the peace, in an action for the killing of stock, the transcript must show affirmatively that the justice had jurisdiction. Where the transcript does not show that the animal was killed in his township, or the statement itself does not appear in the record, the judgment cannot be sustained. Matson v. The Hannibal & St. Joseph Railrord Company, 229.
- 5. Justice's court: APPEAL: NONSUIT: BAR. The plaintiff on appeal from a justice's court, has the right to dismiss his appeal in the circuit court, and thereby vacate entirely the judgment of the justice, and such judgment of nonsuit in the circuit court, and judgment of the justice, constitute no bar to another action. Lee v. Kaiser, 431.
- 6. —: NOTICE: DISMISSAL. An appeal having been taken more than ten days before the next term of the circuit court, and notice thereof served within three days of the next succeeding term.

Held, that necessity of notice relates to the time when it becomes triable against the appellee, that the appeal had been perfected and the court had jurisdiction, and the appeal could be dismissed at such succeeding term, and pending a motion to affirm the judgment of the justice. Ib.

- 7. APPEAL FROM JUSTICE'S COURT, WHEN TRIABLE. Where an appeal from a judgment of a justice of the peace was not taken on the day it was rendered, and no notice of appeal was given, and the appellee did not enter his appearance on or before the second day of the first term of the appellate court, it is error for such court to hear the case and render judgment at such first term. Hawley v. The Missouri Pacific Railway Company, 540.
- 8. Justices of the peace: Jurisdiction, want of. Justices of the peace have no jurisdiction of causes in which both plaintiff and defendant are non-residents of the county in which the action is brought. (R. S., § 2839,) nor do the suing out and service by defendant of subpoenas for witnesses, and the filing of a motion by him to rule the plaintiff to security for costs before moving to dismiss for want of jurisdiction, constitute such an appearance as to confer jurisdiction on the justice. Smith v. Simpson, 634.
- Semble, that consent even could not give jurisdiction in such a case. Ib.

LAND AND LAND TITLES.

- Lost QUARTER SECTION CORNER. To establish a lost quarter section corner of an interior section, the rule is to ascertain the corners of the section on that side, and a point on the line connecting them and equi-distant from them will be the lost corner. Lemmon v. Hartsook, 13.
- 2. Division Lines fixed by act of parties: Estoppel. Where one of two adjoining proprietors, for the purpose of enabling the other to locate a division fence, pointed out a line as the true dividing line between them, and the latter, relying upon this information, built the fence and made other improvements up to this line; Held, that as against him a grantee of the former proprietor was estopped to deny that this was the true line.

But where the parties agreed upon a line, neither knowing the true line and each intending to fix upon it, and each acting on the best information he could get and not relying wholly on the other; *Held*, that there was no estoppel. *Ib*.

3. SWAMP LANDS. In the absence of evidence that the Secretary of the Interior has neglected or refused to decide whether a tract of land, in controversy in an action of ejectment, is swamp or overflowed land, or not, within the act of congress of September 28th, 1850, the defendant will not be permitted to show, by parol evidence, that it falls within that act, for the purpose of defeating a title held under the railroad land grant of congress of June 10th, 1852. Palmer v. Boorn, 99.

- 4. TAX DEED: ADVERSE POSSESSION. A tax deed made under the Back Tax Act of 1877 is of no validity as against one who has acquired title to the land by possession and is in the actual occupation' thereof, unless he is made a defendant in the tax suit. Watt v. Donnell, 195.
- EJECTMENT. Such a deed passes only the title of the defendant in the tax suit, and unless supplemented by evidence that he had some title will not authorize a recovery in ejectment. Ib.
- 6. SWAMP LANDS: TITLE: RIGHT OF COUNTY TO PURCHASE AT MORTGAGE SALE. Under the act of February 23rd. 1855, (R. S. 1855, chap. 93,) and previous acts, the absolute title to the swamp lands in the different counties vested in them respectively, and when purchased of the county with mortgage to secure the purchase money, the county has the right to buy them in, the same as a purchase by a private mortgagee. Mitchell v. Nodaway County, 257.
- 7. LAND TITLE, LEGAL, EQUITABLE: NOTICE: ADMINISTRATION. Where one acquires the legal title to land with notice of some equitable right of another therein, such equitable right so held by such other person is an interest in the land, which can be sold and transferred by his administrator. Atkison v. Henry, 670.

LANDLORD AND TENANT.

LANDLORD AND TENANT: USE AND OCCUPATION. It is well settled law in this State that an action for use and occupation does not lie unless the relation of landlord and tenant, either express or implied, exists between the parties. The Aull Savings Bank v. Aull, 199.

SEE PARTNERSHIP, 1.

LARCENY.

LARCENY: EVIDENCE OF PEISONER'S POSSESSION OF BURGLARS' TOOLS. On a trial for larceny from a dwelling-house, it appeared that defendant was arrested in the vicinity of the locus delicti immediately after the commission of the larceny, under suspicious circumstances tending to connect him with the crime. It also appeared that divers rooms, closets and drawers in the house were ransacked; but there was no evidence that burglars' tools had been used to effect the entry or to open inner doors or drawers. Held, that evidence that the defendant, when arrested, had such tools in his possession was nevertheless admissible. The State v. Davis, 53.

SEE PLEADING CRIMINAL, 7.

LIBEL.

LIBEL: WORDS ACTIONABLE PER SE: PLEADING. Words written of one alleging that he was a supervising architect of a building, and that he promised to and did give the defendants work thereon for a com-

mission paid to him by them, are not actionable per se, and a petition in an action therefor, for libel, which fails to allege the extrinsic facts showing their libelous meaning, is fatally defective. Legg v. Dunleavy, 558.

LICENSE.

SEE DRAMSHOP LICENSE.

LIEN.

- Lien: priority. Where two liens upon real estate are created by the same decree, priority will be given to the one upon which execution is first issued and levied, and a purchaser at a sale thereunder will secure a better title than that acquired by a sheriff's deed at a subsequent sale under the other lien. Shirley v. Brown, 244.
- 2. MECHANIC'S LIEN. A mechanic's lien is enforceable for all the items of an account furnished by the original contractor, for supplying the articles needed in the construction of the building and machinery in which they were used, where it is inferable from the evidence they were furnished under one contract. Fulton Iron Works v. North Center Creek Mining & Smelting Company, 265.

SEE TAXES, 6, 7.

LIMITATIONS.

- Statute of Limitations: Pleading. When the plaintiff relies on matter in avoidance of a plea of the statute of limitations, he must plead it specially. It will not be received in evidence under a general denial. Moore v. Granby Mining Company, 86.
- 2. ——: AVOIDANCE OF. To avoid the statute of limitations it is not sufficient to show that the plaintiff was ignorant of his rights until a time within the statutory period. It must appear that his ignorance was caused by some improper act or concealment practiced by the defendant. Ib.
- 3. Estates for Life and in remainder: adverse possession. The possession of a life tenant is not adverse to the estate of the remainderman, and he cannot, by his declarations, acts or claim of a greater or different estate, make it adverse, so as to enable himself or others claiming under him to invoke the statute of limitations. Keith v. Keith, 125.
- 4. LIMITATIONS: FOREIGN CAUSE OF ACTION. Whether a suit brought in this State on a cause of action originating in another state is barred by limitation, is to be determined by the law of this State. Stirling v. Winter, 141.

- 5. Statute of limitations, when it cannot be invoked. The bar of the statute of limitations cannot be invoked where the occupancy relied on to support it, is neither adverse, nor accompanied by any act showing a claim of exclusive ownership. Burke v. Adams, 504.
- 6. ADMINISTRATION: LIMITATIONS. Under the Administration Law, (R. S. 1879, § 189,) if no cause of action has accrued or exists in favor of the claimant upon his contract or claim when the two years' limitation begins to run, it is not a demand against the estate, within the meaning of the statute, and the limitation does not begin to run before the cause of action has accrued. Tenny v. Lasley, 664.

LUNATICS.

SEE INSANE PERSONS.

DEEDS.

GUARDIAN.

MANDAMUS.

- Mandamus: Res Judicata. When a legal liability has once been judicially ascertained, it will suffice, in a proceeding by mandamus to enforce it, to state that fact. The circumstances out of which it grows need not be stated. School District No. 11 v. Lauderbaugh, 190.
- 2. ——: AMENDMENT. In mandamus proceedings the court can grant no relief except what is specified in the alternative writ, and if not warranted in granting that must refuse any; but the writ is open to amendment. Ib.

MARRIED WOMAN.

SEE HUSBAND AND WIFE.

MISREPRESENTATION.

MISREPRESENTATION AS TO SOLVENCY: WHEN THIRD PERSON CANNOT MAINTAIN ACTION. A misrepresentation to one in regard to the solvency of him who makes it, gives no right of action in favor of a third person against the first for injury by reason of the second repeating such statement to the third person, no relation of principal and agent existing between the latter and the person repeating the statement, and the latter not having been authorized to communicate the statement to the third person. Rawlings v. Bean, 614.

MISTAKE.

MISTAKE: RECOVERY. Ordinarily an action cannot be maintained

upon the ground of plaintiff's mistake alone, unless the recovery which is sought would leave the defendant in statu quo, or unless defendant has been guilty of fraud, or misrepresentation, or would secure some unconscionable advantage by withholding the money. Mathews v. The City of Kansas, 231.

SEE EQUITY, 2.

FALSE REPRESENTATIONS.

HUSBAND AND WIFE, 8.

TAXES, 4, 5.

MORTGAGES AND DEEDS OF TRUST.

- 1. Deeds of trust: satisfaction by stranger: subrogation. Where a land owner, to save his land, pays a note secured by a deed of trust executed by a former owner, and upon which he is not legally liable, the debt is not thereby extinguished; he is subrogated to the rights of the holder as against the maker. Allen v. Dermott, 56.
- The holder of a secured note may sue on the note without enforcing his security. Ib.
- 3. DEED OF TRUST: SALE: VALIDITY. A sale of real estate under a deed of trust executed before the late civil war is valid, although the grantors in the deed made to secure payment of promissory notes were citizens and residents of a state declared to be in insurrection at the time of the sale made while the war was in progress. Mitchell v. Nodaway County, 257.
- Fraudulent Conveyance: creditors. In a suit to set aside a fraudulent conveyance, defendants cannot set up as a defense fraud upon creditors who are strangers to the record. Steadman v. Hayes, 319.
- 5. MORTGAGE: FORECLOSURE: PURCHASER AT IRREGULAR SALE. A fore-closure sale, under a mortgage, which sale is irregular because made during a term of the county court instead of the circuit court, as required by law, does not operate to assign the mortgage debt itself to the purchaser at the sale, so that he can both hold the land and collect the residue due from the mortgageor on the debt. Welle v. Lincoln County, 424.
- 6. ——: CREDITOR: PREFERENCE. A debtor has the right to execute a mortgage to secure a note due one creditor, although such mortgage has the effect to hinder and delay his other creditors. Colbern v. Robinson, 541.
- Security: Fraud. The mere fact that the security given to secure a note is more than is necessary, is, of itself, no indication of fraud. B.

- 8. Moetgage: effect of. A mortgage given to secure the payment of a note, will not have the effect to withdraw the property included in it from the reach of creditors, and judgment creditors, whose judgments against such mortgaged property were rendered before the maturity of the note secured by the mortgage, and before the sale thereunder, may redeem the property from the mortgage, or protect themselves by bidding at the sale, or enjoin the sale until the validity of the mortgage debt can be ascertained. Ib.
- 9. Chattel mortgage: failure to record: sale by mortgageor in possession. A mortgage of goods not recorded, and of which the mortgageor retained the possession, is a nullity as against a purchaser from such mortgageor in possession, even though the purchaser knew of the existence of the mortgage. Rawlings v. Bean, 614.
- 10. Personal property: Mortgagee: Notice of Prior Claim. A mortgagee of personal property, who takes it with notice of an agreement that it should remain the property of the mortgageor's vendor until fully paid for, is bound by such agreement. Kingsland v. Drum, 646.

MUNICIPAL CORPORATIONS.

- 1. Condemnation of property for street purposes; charter: jury. A jury of six men, freeholders of the City of Kansas, as provided for in the charter of said city, is a competent jury to try an appeal from the mayor to the circuit court, in a proceeding under the charter to condemn private property for the purposes of street extension. The City of Kansas v. Hill, 523.
- 2. Condemnation proceedings: evidence. On the trial of said appeal, the defendant offered evidence to show that the fact that the real estate sought to be condemned was located, and had been located for many years, in the line of the street proposed to be extended, and between the east and west parts of said street already opened, diminished its value, which evidence the court excluded; Held, error. Ib.
- 3. ——: INSTRUCTIONS. The city charter provided, in reference to proceedings to condemn property for street purposes, that "parties interested may submit proof to the jury, and the latter shall examine, personally, the property to be taken and assessed;" Held, that an instruction was erroneous which told the jury that in assessing the value of the property, they might wholly disregard the evidence offered, and make their finding from their own observation alone. Ib.

NEGLIGENCE.

1. Public forter: action on his bond. A person whose baggage has been lost through the negligence of a public porter licensed by the city as such, may maintain an action on a bond given by him to the city pursuant to charter and ordinance for the faithful performance of the requirements of the ordinance and the safe delivery of all articles entrusted to his care. City of Chillicothe ex rel. Matson v. Raynard, 185.

- 2. RAILROADS: NEGLIGENCE. If a train does not stop, an attempt of a passenger to get off would, perhaps, constitute such contributory negligence as would preclude a recovery. But, if it stops for a moment, or moves so slowly as to be almost imperceptible, it will be for the jury to say whether it is such negligence as will preclude a recovery. Clotworthy v. The Hannibal & St. Joseph Railroad Company, 220.
- 3. ——: Where a train stops long enough for a passenger to conveniently get off, and, without the fault of the company's servants, he fails to do so, and the conductor, not knowing and having no reason to suspect that he is in the act of alighting, causes the train to start while he is so alighting, the company will not be liable Ib
- 4. Negligence: Child: Street Railway. Whether the driver of a street car, who sees a child under two years of age playing in the street within six feet of the track, and keeps a fast trot until he is within seven feet of the child, is guilty of negligence, is a question for the jury. Farris v. Cass Avenue & Fair Ground Railway Company, 325.
- 5. CHILD: CONTRIBUTORY NEGLIGENCE OF PARENT. Where a child under two years of age escaped, almost from under the eye of the mother, after she had taken all precautions reasonably possible for a person in her circumstances and state of life, onto a street railway and was killed by a passing car: Held, there could be no contributory negligence in the case. Ib.
- 6 CONTRIBUTORY NEGLIGENCE: ACTS OF CHILD. A child under two years of age is, by its own acts, incapable of contributory negligence. Ib.
- 7. RAILROADS: DUTY OF TRAVELER APPROACHING: CONTRIBUTORY NEGLIGENCE. One who approaches a railroad crossing at a locality familiar to him, where the track cannot be seen, and where the noise of an approaching train, if close, would drown the noise of his buggy, and who does not stop to listen for the train, nor look for it until upon the side-track eight and a half feet from the track, although warned in a manner to attract his attention, is guilty of such contributory negligence as will preclude a recovery for an injury sustained from the passing train while attempting to cross. Hisson v. St. Louis, Hannibal & Keokuk Railroad Company, 355.
- 8. Negligence in constructing dam: damages: Pleading. In an action for alleged special damages to plaintiff, occasioned by overflow of water on his land caused by defendant's negligence in constructing a dam, damages for injuries to the land itself, and as to which the petition contains no averment, connot be recovered. Brown v The Chicago & Alton Railroad Company, 457.
- 9. ——: SICKNESS IN PLAINTIFF'S FAMILY: DAMAGES. Sickness in plaintiff's family, caused by such overflow of water from defendant's negligently constructed dam, is a proper element of damages where the same is pleaded in the petition. *Ib*.

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INDEX.

- 10. RAILROAD: ENGINE: ESCAPE OF FIRE. When, in an action for damages against a railroad for the negligent escape of fire from its engine, the defendant has offered proof of care on its part, which evidence is not contradicted, the court should not, as a matter of law, declare that plaintiff's prima facie case is reoutted. Kenney v. The Hannibal & St. Joseph Railroad Company, 574.
- 11. ——: ——: A railroad is not liable for the escape of fire from its engine when it has provided one with the latest, best and most approved machinery, appliances and contrivances to prevent its escape, and a careful and competent engineer to operate the engine, one who used reasonable care to prevent such escape of the fire. Ib.

SEE EVIDENCE, 14.

NOTICE.

PURCHASE WITH NOTICE: AGENCY. He who takes with notice of an equity, takes subject to the equity. Notice is not necessarily positive information brought directly home, but any fact that would put an ordinarily prudent man on inquiry, and a party will be as much bound by notice given to his agent as if it was given to himself personally; and the fact that the agent may be unable to read and write will be immaterial. Meier v. Blume, 179.

SEE PROMISSORY NOTES. 3, 4.

NUNC PRO TUNC ENTRIES.

SEE PRACTICE, CIVIL, 6

OFFICER.

Officer: Salary: Presumption: estopped. An officer of a city government must be presumed to have knowledge of the ordinances or orders establishing and continuing his salary, and where the city has paid him the salary it regarded as due him, and he has received it as such, he is estopped from claiming more. Galbreath v. The City of Moberly, 484.

PARTIES.

SEE PRACTICE, CIVIL.

PARTNERSHIP.

PARTNERSHIP: LANDLORD AND TENANT: FEEDING CATTLE ON SHARES.
 An agreement between landlord and tenant, as a part of the consideration for the lease of a farm, that the landlord shall furnish stock

enough to eat the hay, oats and corn raised on the demised premises, the tenant to feed the stock, and upon sale being made, the landlord to be re-paid his purchase money first, out of the proceeds, and the remainder to be equally divided between the parties, does not constitute them partners in respect to the stock bought and fed under the agreement, following and re-affirming same case, 68 Mo. 242. Musser v. Brink, 350.

Injunction. The property in the cattle, under the agreement, remained in the landlord, and the contract having given the tenant no right to remove them from the farm or to dispose of them without the landlord's consent, injunction lies to prevent him from doing so. Ib.

PERSONAL PROPERTY.

- 1. Personal property: sale: evidence of terms. In a suit by plaintiffs to set aside a chattel mortgage to a third person, because they, as the vendors of the mortgageor, had, by the terms of the sale to him, reserved the property in themselves until it was fully paid for, it is competent for the plaintiffs to prove the terms of said contract of sale, either by the evidence of a person present when it was made, or by the admissions of the vendee in reference thereto, made by him while in possession of the property. Kingsland v. Drum, 646.
- in Mortgagee: Notice of prior claim. A mortgagee of personal property, who takes it with notice of an agreement that it should remain the property of the mortgageor's vendor until fully paid for, is bound by such agreement. Ib.

PLEADING CIVIL

- 1. RAILROADS: KILLING LIVE STOCK: SUFFICIENCY OF COMPLAINT. In an action against a railroad company to recover for the killing of plaintiff's mare, the complaint alleged that the killing occurred where the railroad "was not fenced, and where there was no crossing on said railroad; "that defendant had failed and neglected to maintain good and sufficient fences on the side of its road where said mare got on the track and was killed; and that by reason of the killing of said mare and by virtue of the 809th section of the Revised Statutes," judgment for double damages was prayed. Held, that these allegations and the reference to the statute sufficiently implied that it was defendant's duty to erect and maintain fences at the place, and that the mare got on the track in consequence of defendant's failure to do this, and that the complaint was good after verdict. Juckson v. The St. Louis, Iron Mountain & Southern Railway Company, 147.
- PLEADING LEGAL CONCLUSIONS. An issue raised on the statement of a legal conclusion which presents the real point in controversy, will be regarded as sufficient after verdict. Ib.
- 3. RAILROADS: PLEADING. A complaint under the 43rd section of the Railroad Law omitted to aver that the cattie injured came upon

the track at a point where it was not fenced, but did state that the injury was occasioned "solely on account of the defendant's failure to maintain fences." Held, that this averment excluded every other implication than the one that the cattle came upon the track where it was not fenced, and sufficiently supplied the omission. Fields v. The Wabash, St. Louis & Pacific Railway Company, 203.

- Petition: Assault and Battery
 which does not charge that the assault was wrongful, but alleges
 that it was "with force and arms," is good after verdict. McKee v.
 Calvert, 348.
- : : GENERAL VERDICT. One good count in a petition containing two counts for the same cause of action, will support a general verdict. Ib.
- 6. PLEADING: JOINDER OF DIFFERENT CAUSES OF ACTION: SLANDER-While under the code, in an action for slander, causes of action for words imputing to plaintiff the crimes of perjury, larceny and adultery may be united in the same petition, they should be separately stated, with the relief sought for each cause of action. Christal v. Craig, 367.
- misjoinder in same count: waiver. Where such causes of action are joined in the same count of the petition, and defendant does not move for a rule requiring plaintiff to elect, the objection of such misjoinder is waived. Ib.
- SEVERAL CAUSES OF ACTION: GENERAL VERDICT. But if one or more of the causes of action thus united in the same count be fatally defective for failure of sufficient statement of facts to constitute a cause of action, a general verdict is erroneous as to all of the causes of action. Ib.
- PLEADING: SLANDER. The statement of a cause of action for slander, for words imputing to a woman the crime of adultery, should contain an averment of her coverture, and in the absence of such averment, no instruction should be given as to said cause of action. Ib.
- 10. SLANDER: PLEADING: EXPLANATORY AVERMENTS. The words "You have took my pocket book and money, and have got it there in your bucket," are not actionable per se, and in an action for slander therefor the petition must contain explanatory averments showing their application and the imputation intended to be conveyed thereby. Ib.
- 11. PLEADING, CODE: AD DUMNUM CLAUSE. Under the code, a petition is not defective because it does not contain an ad damnum clause; it is sufficient in this respect if it contains a prayer for judgment for the damages demanded. Ib.
- 12. LIBEL: WORDS ACTIONABLE PER SE: ELEADING. Words written of one alleging that he was a supervising architect of a building, and that he promised to and did give the defendants work thereon for a commission paid to him by them, are not actionable per se, and a petition in an action therefor, for libel, which fails to allege the extrinsic facts showing their libelous meaning, is fatally defective. Legg v. Dunleavy, 558.

- 13. PLEADING: SPECIAL CONTRACT: COMMON COUNTS: CODE. Where a special contract has been fully executed, and nothing remains to be done but to pay the stipulated sum of money due thereon, the common counts in *indebitatus assumpsit* will lie to recover the same. This was the rule at common law, and it has not been changed by the code. Mansur v. Botts, 651.
- 14. PLEADING: SEVERAL DEFENSES. The several pleas of non est factum as to the instrument sued on, payment of another debt on a different note only appearing in suit by pleading and evidence tending to show why defendant is not liable on the note sued on, and the statute of limitations, do not constitute inconsistent defenses. May v. Burk, 675.

SEE RAILROADS.

EJECTMENT.

PLEADING CRIMINAL.

- An indictment for obtaining money under false pretenses which
 set out such pretenses, negatived their truth and further alleged
 "all of which the defendant then and there well knew," Held, after
 verdict, not to be obnoxious to the objection that the scienter was
 not sufficiently averred. The State v. Janson, 97.
- 2. An indictment for obtaining money under false pretenses which alleged that defendant had falsely stated that he was about to ship, and had shipped, certain goods, and that upon the faith of the coming thereof he obtained the money in question, *Held*, not obnoxious to the objection that it set out the representation of a future event merely. *Ib*.
- 3. Township organization: Judicial notice: Indictment. Judicial notice is not taken of the fact that a county has adopted township organization. Unless such be the fact, there is no such office as that of township trustee. It is, therefore, essential that such fact be alleged in an indictment under section 41 of article 3, chapter 42 of Wagner's Statutes, against a township trustee for converting to his own use the public moneys of the township. See City of Hopkins v. Railway Co., 79 Mo. 98. The State v. Cleveland, 108.
- 4. Intoxicating Liquor: Information: Variance. Under Revised Statutes 1879, section 5459, permitting the maker of intoxicating liquor to sell the same, at the place where made, in quantities not less than one quart, but forbidding him to suffer the same to be drunk on the premises where sold, a conviction upon an information charging the sale of one pint without having a license as a dramshop keeper, is not sustained by proof of the sale of a quart, by the maker, at the place where made, and suffering the same to be drunk thereat. Suffering the liquor to be drunk at the place of sale is a distinct offense from the act of selling. The State v. Apperger, 173.
- 5. Druggist selling liquor: indictment not multifarious, An

indictment in one count charged the defendant, a druggist, with unlawfully selling intoxicating liquor in a quantity less than one gallon, to-wit: one gill of whisky for five cents, one gill of brandy for five cents, one gill of wine for five cents, one gill of gin for five cents and also with allowing the liquor to be drunk on the premises. Held, not multifarious. The State v. McAdoo, 216.

- An indictment under the act of 1877, (Sess. Acts 1877, p. 342, § 1,) against a druggist for unlawfully selling intoxicating liquor, is bad unless it expressly avers that it was not sold for medicinal purposes. Ib.
- 7. INDICTMENT: LARCENY: CATTLE. An indictment under section 1307, Revised Statutes 1879, for the larceny of neat cattle, is sufficient if it charges the theft of "certain cattle, to-wit, one steer," and the value need not be laid. The term "cattle" designates domestic quadrupeds collectively, but the term "neat cattle" includes only cattle of the bovine species. A steer belongs to the class of neat cattle, and it would be sufficient to use the word "steer" without employing the term "cattle" or "neat cattle." The State v. Lawn, 241.
- Indictment, sufficiency of. An indictment authorized by Revised Statutes 1879, section 1561, Held, sufficient, following The State v. Fancher, 71 Mo. 460. The State v. Dennis, 589.
- 9. Assault with intent to rape: Indictment. An indictment for an assault with intent to commit a rape, need not set forth the manner or means of the assault charged. The general averment that the assault was made with the intent to ravish, is all that is requisite, and the details as to the mode and means of the act, are matters of evidence. The State v. Smith, 516.

PRACTICE CIVIL.

- 1. Jury trial. Where an answer in ejectment combined a legal with an equitable defense, *Held*, that it was error to refuse a jury trial upon the issues at law. But where the parties after such refusal submitted the case for trial to a counselor of the court, stipulating that his finding should be entered as the finding of the court; *Held*, that this waived the right to have a jury. *Grayson v. Weddle*, 39.
- Instructions. Where there is no evidence upon which to base an instruction, it is properly refused. The State v. Gerber, 94.
- 3. Garnishment: Service on Railroad companies. To make a valid garnishment of a railroad company under the proviso to section 2521, Revised Statutes 1879, the notice must be delivered to "the nearest station or freight agent" of the company, and the officer's return must so describe the person to whom it is delivered. A return describing him as the "nearest agent" is insufficient. Haley v. The Hannibal & St. Joseph Railroad Company, 112.
- Transportation contract: Party Plaintiff. Suit on a transportation contract is properly brought in the name of the consignor.

- whether he be the owner of the property or not. Atchison v. The Chicago, Rock Island v. Pacific Railway Company, 213.
- 5. PRACTICE: DEMURRER. Where evidence is presented on both sides tending in any degree to establish the respective theories of plaintiff and defendant, it is error to take the case from the jury by instruction. Clotworthy v. The Hannibal & St. Joseph Railroad Company, 220.
- 6. Parties: order of publication. One cannot be made a party to a suit under Revised Statutes, section 3499, when the petition and order of publication do not conform to the requirements of said section. Quigley v. Mexico Southern Bank, 289.
- Recovery: PLEADING: INSTRUCTION. Recovery can only be had upon the case made by the pleadings. The issues cannot be changed by an instruction. Glass v. Gelvin, 297.
- 8. Entry nunc pro tunc: when made. Unless there is something of record by which to amend, an entry nunc pro tunc cannot be made. But where the files of the court, the motion, the entry of its filing, its purpose and the entry of similar orders at the same term, in the same cause, show that the order was made, a nunc pro tunc entry may be made. Hansbrough v. Fudge, 307; Briant v. Jackson, 318.
- PRACTICE: REPLY: FAILURE TO FILE. Where a cause has been tried
 on the theory that a reply has been filed putting in issue the new
 matter of the answer, the omission to file such reply cannot be taken
 advantage of on an appeal. Heath v. Goslin, 310.
- 10. —: VARIANCE. In an action for slander, it is not sufficient that the offense proved be equivalent to or substantially the one alleged; the phraseology must be the same. Christal v. Craig, 367.
- ----: VARIANCE. An instruction in an action for slander, that if
 the words proved have the same sense as those alleged, there is no
 variance, is erroneous. Ib.
- MISJOINDER: WAIVER. Misjoinder of causes of action must be taken advantage of by demurrer or answer, or it is waived. Hoyle v. Farquharson, 377.
- 13. SEVERAL COUNTS: VERDICT ON ONE. Where the petition contains several counts, and all of them are submitted to the jury, who return a verdict for plaintiff on a specified one, this is an implied finding for defendant on the other counts, and the judgment will be a bar to any subsequent suit on the demands contained in the counts not named in the verdict. *Ib*.
- 14. EVIDENCE. Where the replication simply denies the allegations in the answer of a final settlement, the evidence will be confined to the issues thus made. Galbreath v. The City of Moberly, 484.
- 15. PLEADING: PRACTICE: PARTIES. Where all of several tenants in common do not join in an action of quare clausum fregit, the defendant cannot take advantage of it after having gone to trial, but must

- plead it in abatement. Thompson v. The Chicago, Rock Island &. Pacific Railway Company, 521.
- 16. ____: ____. Under our practice, when a defect of parties appears on the face of the petition, it must be taken advantage of by demurrer, and if it does not so appear, by answer; and if not thus taken advantage of, the objection is deemed to be waived. Ib.
- BILL OF EXCEPTIONS, MATTER OF. A bill of exceptions cannot, as a general rule, include matters which did not occur at the term of the court at which it was filed. Jones v. Evans, 565.
- 18. Practice: Demurrer. Where there is any testimony to support a cause of action, it should be left to the determination of the jury, and a demurrer to the evidence should not be sustained. Walsh v. Morse, 568.
- Instructions. It is not error to give an instruction when there is any evidence upon which to base it. Ib.
- PRACTICE: INSTRUCTIONS. Instructions based on a defense not raised by the answer, or on facts stated therein not constituting a defense are properly refused. Mosman v. Bender, 579.
- 21. EVIDENCE: SPECIAL CONTRACT: AMOUNT OF RECOVERY. But the plaintiff having introduced the special contract in evidence, is limited in his recovery to the sum specified therein, although in his petition he declared on a quantum meruit. Mansur v. Botts, 651.
- 22. Practice civil: instructions. Instructions should be predicated on the whole evidence, and present, for the consideration of the jury, the different aspects of the questions at issue, as shown by the pleadings and evidence. *Ib*.
- 23. Practice: Parties: foreign administrators. Foreign administrators cannot sue in the courts of this State; but if such defect of parties is not taken advantage of in the trial court by demurrer or answer, it will be deemed to be waived, and objection cannot be raised for the first time in the Supreme Court. May v. Burk, 675.
- Postponement and continuance of trial. See Kenney v. The Hannibal & St. Joseph Railroad Company, 573.

SEE INSTRUCTIONS.

PRACTICE CRIMINAL.

- Venue. Where the bill of exceptions purports to preserve all the evidence, and fails to show that the offense was committed in the county charged in the information, the judgment will be reversed. The State v. Apperger, 173.
- DISCRETION OF COURT: WITNESS. Where a witness was not subpoenced, and no diligence used to procure his attendance, it is within

the discretion of the trial court to refuse to allow him to testify after the case is closed, but before it is submitted to the jury. The State v. Smith, 516.

- 3. INDICTMENT: VARIANCE. Where the indictment charges the assault was made on Olive Hodson, and the evidence shows that it was Mrs. Hodson, Held, no variance material to the merits of the case, since the court below did not so find, and that finding is the test on this point. Ib.
- 4. ——: READING TO THE JURY. Revised Statutes, section 1908, does not require that the instructions should be read to the jury in the first instance, by the judge himself. *Ib*.
- 5. Instructions. Where there is a conviction for a higher offense, a defendant cannot complain of an instruction authorizing a conviction for a lower. And it is not error to refuse instructions when those given fairly present the case to the jury. *Ib*.
- 6. Practice criminal: discharge of jury: judicial discretion. Where a trial court has a discretion in a matter of practice, its exercise of the same is presumed to be sound and correct until the contrary is plainly and manifestly made to appear, and on the facts presented in the present case, it fails to appear that the trial court abused its discretion in discharging the juries on two trials of defendant for murder, because they could not agree on a verdict. The State v. Dunn, 681.
- Practice criminal: Harmless instructions. A defendant cannot complain of the giving of an instruction as to a grade of manslaughter, of which he was not convicted, even though the instruction was erroneous. Ib.
- PRISONER'S ABSENCE FROM MOTION FOR NEW TRIAL. Unless it appears from the record affirmatively that the prisoner was denied the right or privilege of being present when his motion for new trial was argued and determined, his absence will be no ground for reversal. The State v. Lewis, 110.

PRACTICE IN SUPREME COURT.

- PRACTICE IN THE SUPREME COURT. Where the bill of exceptions
 preserves neither the motion for a new trial, nor that in arrest of
 judgment, the Supreme Court cannot take notice of the errors, if
 any, in the progress of the trial. The State v. Janson, 97.
- PRISONER'S ABSENCE FROM MOTION FOR NEW TRIAL. Unless it appears
 from the record affirmatively, that the prisoner was denied the
 right or privilege of being present when his motion for new trial
 was argued and determined, his absence will be no ground for reversal. The State v. Lewis, 110.
- Reviewable errors. Where no exception to the action of the court in overruling a motion for new trial is saved in the bill of exceptions, this court is limited to an examination of such errors as

may appear in the record proper. Jackson v. The St. Louis, Iron Mountain & Southern Railway Company, 147.

- Venue. Where the bill of exceptions purports to preserve all the evidence, and fails to show that the offense was committed in the county charged in the information, the judgment will be reversed. The State v. Apperger, 173.
- Practice: The record. This court will not reverse a judgment for refusal of the trial court to admit evidence, if it cannot determine from the record whether the evidence is material or not. The Aull Savings Bank v. Aull, 199.
- sets forth a legal cause of action, and the evidence is not preserved in the bill of exceptions, but it is stated that the plaintiff introduced evidence tending to prove the allegations of the petition, and that defendant introduced no evidence, this court will presume that the evidence justified the trial court in refusing to take the case from the jury. And where, in such a case, an instruction appears in the record which authorizes the jury to find for the plaintiff without requiring them to find some fact legally essential to recovery, this will not be reversible error. When testimony is undisputed, an instruction may properly assume its truth. Fields v. The Wabash, St. Louis & Pacific Railway Company, 203.
- 7. Instructions: HARMLESS ERROR. This court will not reverse for an error in the phraseology of a single instruction, when it is manifest, taking it in connection with the issues made in the pleadings and all the other instructions, that the jury could not have been misled. Bradford v. Floyd, 207.
- Practice in the supreme court: Bill of exceptions. This court
 will not review a case, the record of which contains no bill of exceptions preserving the evidence and motions. Ray v. Brown, 230.
- CRIMINAL PRACTICE: LARCENY: INSTRUCTIONS. On a trial for larceny
 where there is evidence to prove a mere trespass, and the defendant's guilt is very much in doubt, the Supreme Court will closely
 scrutinize the instructions and reverse the cause if they are misleading. The State v. Irwin, 249.
- 10. Practice: objections: Instructions. This court will not review a case when no objections are made or exceptions saved to the admission of evidence during the trial, and no instructions asked, or given by the court. The law applicable to a case can only be reviewed by this court when declarations of law or instructions are asked. Harrington v. Minor, 270.
- 11. Practice in the supreme court: BILL of exceptions. Where neither the motion for new trial nor that in arrest of judgment is preserved in the bill of exceptions, this court will only review such errors as are apparent in the record proper. McKee v. Calvert, 348.
- SUPREME COURT: FORMER DECISION IN SAME CASE. The Supreme Court, on a second appeal in a cause, will follow its previous decis-

ion, unless the facts developed on the re-trial require a different decision as applicable thereto. Musser v. Brink, 350.

- Practice in supreme court. The Supreme Court will reverse a cause for material error apparent on the face of the record, although no motion in arrest or for review is made in the circuit court. Mc-Intire v. McIntire, 470.
- 14. Instructions, review of. It is unnecessary to review instructions when the result of the trial could not lawfully be otherwise than it is. Galbreath v. The City of Moberly, 484.
- APPEAL: AGREED CASE. The appeals in this proceeding Held, to be properly in the Supreme Court, under rule 20 thereof, relating to agreed cases. The City of Kansas v. Hill, 523.
- 16. EVIDENCE: SPECIAL CONTRACT: AMOUNT OF RECOVERY. But the plaintiff having introduced the special contract in evidence, is limited in his recovery to the sum specified therein, although in his petition he declared on a quantum meruit. Mansur v. Botts, 651.

SEE JURISDICTION, 2.

PRINCIPAL AND AGENT.

- 1. Principal and agent: Liability on contract of agent: Sealed instrument. Plaintiff sold one Y. a tract of land, the title to which was in doubt. By an instrument under seal, to which defendant was no party and in which he was not named, plaintiff agreed to use diligence in perfecting the title and to have it vested in Y., and thereupon Y. was to pay one-half of the purchase money, the other half being paid in cash. In making the purchase Y. was acting as agent of defendant, and he immediately assigned the contract to defendant, who took possession. Defendant had furnished the money for the cash payment. Plaintiff subsequently aided in perfecting the title, and the same was finally vested in defendant. Held, that though plaintiff could not maintain an action against defendant on the contract, because it was under seal and defendant was no party to it and was not named in it, yet he could sue on the implied obligation growing out of all the facts stated. Moore v. Granby Mining & Smelling Company, 86.
- 2. Purchase with notice: agency. He who takes with notice of an equity, takes subject to the equity. Notice is not necessarily positive information brought directly home, but any fact that would put an ordinarily prudent man on inquiry, and a party will be as much bound by notice given to his agent as if it was given to himself personally; and the fact that the agent may be unable to read and write will be immaterial. *Meier v. Blume*, 179.
- 3. AGENT'S DECLARATIONS AND VERBAL ACTS. The declarations of an agent are admissible as evidence against his principal only when made while transacting the business of the principal and as a part of the transaction which is the subject of inquiry. Hence, where the baggage-master of a railroad company, while away from the baggage-room of the company and engaged in the transaction of his

private pusiness on his own premises, gave directions to a stranger with reference to the delivery of baggage; Held, that they were not binding on the company. City of Chillicothe ex rel. Matson v. Raynard, 185.

4. ATTORNEY: NOTE HELD FOR COLLECTION ONLY: SALE WITHOUT AUTHORITY: LIABILITY OF PURCHASER. A bank is liable for the money collected on a note, where it was placed by the owner in the hands of an attorney for collection only, and the attorney, without the owner's authority, indorsed the latter's name thereon and sold it to the bank, which collected it from the maker; and this is true, although the bank was ignorant of the unauthorized indorsement and purchased the note in good faith for a full consideration and before maturity. Quigley v. The Mexico Southern Bank, 289.

PRINCIPAL AND SURETY.

- 1. Joint debtors: Suretyship: Subrogation. Where one of three joint debtors gave security to another by way of indemnity against the debt; Held, that the third, who stood in the relation of surety to both, had no right to insist that the security should be exhausted before the creditor proceeded against him; (1) Because his only right in respect of the security was to be subrogated to its benefits, and this would not arise until he had paid the debt; (2) Because co-promisors cannot, by arrangements between themselves, hinder and delay their creditor in the collection of his demand. Roberts v. Jeffries, 115.
- 2. PRINCIPAL: SURETY: SUBROGATION. Where the purchaser of bank stock borrowed the money with which to pay for the same, giving his note therefor with personal security, the stock to be retained in the bank as further security to the payee of the note, and, after the death of the principal, the payee obtains judgment against the surety, such surety, as soon as he shall have paid the judgment, is entitled to be subrogated to the rights of the creditor in the principal's stock. May v. Burk, 675.
- 3. _______. If the administrators of the deceased principal paid the judgment against his surety with the proceeds of the sale of the bank stock, upon the agreement of the surety to refund to them any excess of liabilities of decedent's estate over assets, then the surety was not a creditor of the estate, and the agreement was without consideration. Ib.

PRESUMPTIONS.

SEE OFFICER.

PRIORITY.

SEE LIEN.

PROMISSORY NOTES.

- PAYMENT BY NOTE. The giving of a note for an existing indebtedness, is not a payment of the debt, unless it is given and accepted as such. Wiles v. Robinson, 47.
- 2. Promissory notes. Where defendant's name appeared on a note in suit as indorser, but it was clearly shown that he was really the borrower of the money for which the note was given; Held, that an instruction which assumed that he was an accommodation indorser was error. Donnell v. The Lewis County Savings Bank, 165.
- 3. ——: NOTICE OF DISHONOR: ASSIGNMENT FOR CREDITORS: NON-RESIDENT CREDITOR. A bank of this State bound as indorser of a note payable in New York and held there, failed and made an assignment for the benefit of creditors. The note not being paid at muturity, the holder caused it to be protested and notice to be given to the bank, but not having heard of the failure and assignment, gave no notice to the assignee. Held, that the notice given was sufficient to bind the bank. Ib.
- 4. _____. If one, whose name appears on a note as indorser, is really the maker, it is his duty to provide for its payment, and if he fails to do so, and the note goes to protest, he is not entitled to notice. Ib.
- corporation. If a bank borrows money and gives its note therefor, the fact that its officers may have misapplied the money cannot defeat the holder's right to recover. Ib.

RAILROADS,

- RAILROADS: FENCES. A railroad company is not liable for injuries to stock occasioned by defects in a fence which, when erected, was sufficient, unless it knew of such defects, or might have known if it had used due care in maintaining such fence. Vinyard v. The St. Louis, Iron Mountain & Southern Railway Company, 92.
- 2. Garnishment: Service on Railroad companies. To make a valid garnishment of a railroad company under the proviso to section 2521, Revised Statutes 1879, the notice must be delivered to "the nearest station or freight agent" of the company, and the officer's return must so describe the person to whom it is delivered. A return describing him as the "nearest agent" is insufficient. Haley v. The Hannibal & St. Joseph Railroad Company, 112.
- 3. RAILROAD: CHANGE OF GAUGE AND ROUTE. The return to an alternative writ of mandamus requiring a railroad company to re-lay a certain portion of its road, which it had torn up and dismantled, and to re-equip, maintain and operate the same as a narrow-gauge railroad, showed in substance, that the respondent company had been formed by consolidation of several other companies; that it had acquired the portion of road in question (at the time a narrow-gauge) from one of these companies, and with it the rights, privileges and immunities secured by the charter of said company, among which was the power and right at any time to alter and change its road-bed,

or any part thereof; that because the bridges, iron and ties on the road acquired from said company had become worn out, dangerous and unfit for use, and for other considerations relating to the business of respondent and the convenience and safety of the public, respondent, in pursuance of authority derived from the public statutes of the State and a vote of more than two-thirds of its board of directors, had determined to change the whole of said road (of which the portion of road in question was but a part) to a standard gauge road; that respondent had actually made and completed this change on all of said road except the portion in question, and on that portion, for purposes of ecoromy, convenience and safety, had caused a new route to be surveyed, and was proceeding with all reasonable dispatch to construct said changed line, and had provided the materials and equipments necessary for the operation of the same as a standard gauge road, and expected to complete the same within four months, which was as soon as it could be done with due and proper consideration of respondent's other business, economy, efficiency and the safety and convenience of the public; that respondent was in the meantime furnishing to the public all needed facilities in conveying persons and property between the termini of said dismantled line; that all of respondent's other lines were of the standard gauge, and that it was wholly impracticable successfully, efficiently and economically to maintain and operate the portion of road in question in connection with the rest as a narrow-gauge. Held, that this return was good on demurrer. The State ex rel. v. The Missouri Pacific Railway Company, 117.

- an action against a railroad company to recover for the killing of plaintiff's mare, the complaint alleged that the killing occurred where the railroad "was not fenced, and where there was no crossing on said railroad; "that defendant had failed and neglected to maintain good and sufficient fences on the side of its road where said mare got on the track and was killed; and that by reason of the killing of said mare and by virtue of the 809th section of the Revised Statutes," judgment for double damages was prayed. Held, that these allegations and the reference to the statute sufficiently implied that it was defendant's duty to erect and maintain fences at the place, and that the mare got on the track in consequence of defendant's failure to do this, and that the complaint was good after verdict. Juckson v. The St. Louis, Iron Mountain & Southern Railway Company, 147.
- 5. ——: KILLING STOCK: JUSTICE'S JURISDICTION. In determining whether the justice of the peace, before whom a suit under the 43rd section of the Railroad Law has been brought, is of the township where the cattle were killed, this court is not confined to the plaintiff's statement of his cause of action, but may look as well to the justice's transcript. Fields v. The Wabash, St. Louis & Pacific Railway Company, 203.
- 6. —: PLEADING. A complaint under the 43rd section of the Railroad Law omitted to aver that the cattie injured came upon the track at a point where it was not fenced, but did state that the injury was occasioned "solely on account of the defendant's failure to maintain fences." Held, that this averment excluded every other implication than the one that the cattle came upon the track where it was not fenced, and sufficiently supplied the omission.

- 7. —: KILLING STOCK: JURISDICTION. On an appeal from a justice of the peace, in an action for the killing of stock, the transcript must show affirmatively that the justice had jurisdiction. Where the transcript does not show that the animal was killed in his township, or the statement itself does not appear in the record, the judgment cannot be sustained. Matson v. The Hannibal & St. Joseph Railroad Company, 229.
- 8. ——: NEGLECT TO FENCE: EVIDENCE. Direct evidence that stock passed through a defective place in the fence, is not required to sustain an action against a railroad for double damages for injuries to the stock, occasioned by the escape of the latter on the roadway at a place where defendant neglected to maintain a lawful fence. Gee v. The St. Louis, Iron Mountain & Southern Railway Company, 283.
- 9. : : SICKNESS IN PLAINTIFF'S FAMILY: DAMAGES. Sickness in plaintiff's family, caused by such overflow of water from defendant's negligently constructed dam, is a proper element of damages where the same is pleaded in the petition. Brown v. The Chicago & Alton Railroad Company, 457.
- 10. ——: ENGINE: ESCAPE OF FIRE. When, in an action for damages against a railroad for the negligent escape of fire from its engine, the defendant has offered proof of care on its part, which evidence is not contradicted, the court should not, as a matter of law, declare that plaintiff's prima facie case is rebutted. Kenney v. The Hannibal & St. Joseph Railroad Company, 574.
- 11. —: —: A railroad is not liable for the escape of fire from its engine when it has provided one with the latest, best and most approved machinery, appliances and contrivances to prevent its escape, and a careful and competent engineer to operate the engine, one who used reasonable care to prevent such escape of the fire. Ib.
- 12. PLEADING: RAILROAD: KILLING STOCK. A statement, in an action against a railroad, for double damages for killing a colt, occasioned by its neglect to fence as required by law, which alleges that the killing occurred at a point where the road passes along, through and adjoining inclosed fields, negatives the idea that the colt might have been killed in an incorporated town. Williams v. The Hannibal & St. Joseph Railroad Company, 597.
- 13. RAILROAD; KULLING STOCK: INSTRUCTIONS. In such action, an instruction was unobjectionable which told the jury that they should find for defendant, if they believed that the fence, where the colt got over the same, was a post and plank one of the height of four and one-half feet, and that the same was broken down by plaintiff's colt or by some other horses. For by mules, and that thereby and at the time the fence was broken, the colt got on the track of the railroad and was killed. Ib.
- 14. JURISDICTION. The jurisdiction as to the amount in such action, would be governed by the sum claimed as single damages, and not by the amount after the damages are doubled. *Ib*.

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- 15. Railroad: Killing Stock: Double Damages: Statement. A statement in an action before a justice of the peace, against a railroad for double damages for killing a horse, is sufficient which charges that the defendant, at a point on its road where the same passes along and adjoining inclosed and uninclosed lands, and not at a private or public crossing, ran over and killed the horse, and that defendant failed and neglected to erect or maintain good or sufficient fences on the sides of its road at the point where the horse got upon the track and was killed, and concludes with a prayer for double damages under the statute. Johnson v. The Missouri Pacific Railway Company, 620.
- 16. ——: STOCK: ESCAPE THROUGH ADJOINING PROPRIETOR'S PASTURE ONTO ROAD. Where, in such action against a railroad for killing plaintiff's horse, the evidence showed that plaintiff was not an adjoining proprietor within the meaning of the statute, and that his horse escaped from a pasture not coterminous with the right of way and through the inclosed field of an adjoining proprietor, it is necessary for the plaintiff to prove, before he can recover, that his horse was in the adjoining proprietor's field by authority, or that the fence of the field was not a lawful fence. Ib.

REPLEVIN.

- Excessive TAX: REPLEVIN. Replevin will not lie against the collector
 of taxes to recover personal property seized to satisfy a tax levied
 by the proper officer; and it does not matter that the levy is excessive, and that fact is apparent on the face of the tax-book. Mowrer v. Helferstine, 23.
- 2. Replevin, value of goods how assessed: Damages. In an action of replevin, where the defendant claims the goods replevied and demands a return thereof, and the jury find in his favor, they should assess the value of the goods at the time of such assessment, and the damages, if any, sustained by defendant in consequence of the taking and detention. Pope v. Jenkins, 30 Mo. 528, followed; Woodburn v. Cogdal, 39 Mo. 228, and Miller v. Whitson, 40 Mo. 101, disapproved. Chapman v. Kerr, 158.

ROADS.

SEE APPEALS, 5.

SALES.

1. Sale or consignment: Evidence. Plaintiffs made sundry shipments of goods to defendants, and with them in each case sent bills in the form of ordinary merchants' bills of sale. Held, that if nothing appeared to the contrary, the jury were warranted in finding that the goods were sold, and that they could not find that they were consigned unless there was contradictory evidence clearly preponderating. Chapman v. Kerr, 158.

- 2. ______. In order to overcome the presumptive evidence of a sale of goods, furnished by a bill accompanying the delivery thereof in the form an ordinary sales bill, it is not necessary to prove that such goods were received and accepted as a consignment if, pursuant to agreement, consigned for sale. Ib.
- 3. DEED OF TRUST: SALE: VALIDITY. A sale of real estate under a deed of trust executed before the late civil war is valid, although the grantors in the deed made to secure payment of promissory notes were citizens and residents of a state declared to be in insurrection at the time of the sale made while the war was in progress. Mitchell v. Nodaway County, 257.
- 4. Delivery: Question of LAW or fact. When there is no dispute as to the facts, the question of delivery is one of law, but where there is a conflict in the evidence it is a question of fact for the jury. Glass v. Gelvin, 297.
- 5. Possession: Vendor: Vender: Agent. A vendor may sell goods in the possession of his agent or bailee, and transfer a valid title, the possession of the agent then becoming the possession of the vendee. *Ib*.
- 6. Mortgage: foreclosure: purchaser at irregular sale. A foreclosure sale, under a mortgage, which sale is irregular because made during a term of the county court instead of the circuit court, as required by law, does not operate to assign the mortgage debt itself to the purchaser at the sale, so that he can both hold the land and collect the residue due from the mortgageor on the debt. Wells v. Lincoln County, 424.

SEE PERSONAL PROPERTY.

SCHOOLS.

Schools: Division of districts. When a new district is formed, including within its limits those who have heretofore aided in the erection of a school house in the district from which they are detached, the tax authorized by section 7024, Revised Statutes, to raise a fund for the erection of a school house for the new district is to be levied upon the whole of the original district, and not on only so much of it as is left after taking off the new district. School District No. 11 v. Lauderbaugh, 190.

SET-OFF.

Set-off: commissions: assignment. In a suit upon a promissory note where the defendant pleads as a set-off commissions from plaintiffs due a co-partnership, of which he is a member, if the commissions were assigned to defendant, by the co-partnership, before the commencement of the suit, then, for the purposes of a set-off, they were due him, and accorded with the allegation of the answer. And if

defendant's co-partners allowed him the commissions individually, with consent of plaintiffs, it was in effect, an assignment with notice. *Hall v. Allen*, 286.

SHERIFF'S DEED.

SEE DEED.

SIGNIFICATION OF TERMS.

"CATTLE," "NEAT CATTLE," "STEERS." See The State v. Lawn, 241.

SLANDER.

SEE PLEADING, CIVIL, 6, 7, 8, 9, 10.

EVIDENCE, 20.

PRACTICE, CIVIL, 8, 9.

STATUTES CONSTRUED.

REVISED STATUTES OF 1879,

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Section					
Section	206,	see	page	664.	
Section	325.	see	page	504.	
Section	669,	see	page	474.	
Section	809,	see	page	147.	
Section	1244.	see	page	681.	
Section	1249,	see	page	681.	
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REVISED STATUTES, 1855.

Page 748, § 56, see page 257. Pages 1005, 1000, §§ 1, 21, see page 257.

ACTS OF 1877.

Page 342, § 1, see page 216.

ACTS OF 1883.

Pages 86, 87, §§ 1, 4, see page 601.

SUBROGATION.

SEE PRINCIPAL AND SURETY, 1, 3.

MORTGAGES AND DEEDS OF TRUST, 1.

SUPERSEDEAS.

SEE APPEALS, 3, 4.

SWAMP LANDS.

SEE LAND AND LAND TITLES, 4, 7.

TAXATION.

EXCESSIVE TAX: REPLEVIN. Replevin will not lie against the collector of taxes to recover personal property seized to satisfy a tax levied by the proper officer; and it does not matter that the levy is excessive, and that fact is apparent on the face of the tax-book. Mowrer v. Helferstine, 23.

TAX DEED.

SEE LAND AND LAND TITLES.

EVIDENCE.

TAXES. .

- 1. Taxes: collector: seizure. A collector can seize personal property by virtue of the tax-book and annexed warrant, commanding the collection of the personal tax appearing in the tax-book, although the latter may not conform to the law in containing upon its face a descriptive list of the personal property upon which the tax was claimed. Dickson v. Rouse, 224.
- COLLECTOR: WARRANT. The tax-book and warrant having been delivered to the defendant as collector upon his accession to office, he having been appointed in the place of another who failed to qualify, the fact that the warrant itself was addressed to the latter does not affect the validity of the seizure and levy made by the defendant.
 Ib.
- 3. Tax books. The books in the collector's office are not records within the rule in Vance v. Corrigan, 78 Mo. 94, so that if the name of the defendant in the tax suit appears on those books as owning the land, he is to be regarded as the record owner. Watt v. Donnell, 195.
- 4. MISTAKE: TAXES: COLLECTOR: PAYMENT ON WRONG LAND. Taxes on real property are assessed against the land, and not against the owner. When they become due, it is the duty of the owner to pay the tax assessed on the land as such, and where one pays the taxes on certain described land or lots designated by him as his, and requests and receives the receipt of the collector therefor, he cannot afterward recover the amount on the ground of mistake. It would be otherwise where the owner or his agent trusts to the collector to

look up the numbers, which the collector undertakes to do, and fur nishes the wrong numbers, and payment is made upon the belief of their correctness. Mathews v. The City of Kansas 231.

- 5. ______. The collector acts for the public in the collection of the revenue. The mistake of the tax-payer, himself, should not imperil this fund, and where one lies by for four years after making such mistake before demanding a rectification, he should, at least, come with clearest equity. Ib.
- 6. Taxes: collection: seizure. No means can be resorted to to coerce the payment of taxes, other than those provided by statute, and the only manner in which the collector can proceed against personal property for taxes due on it, is, after the required demand and notice, to seize it as directed by the revenue law, and there can be no lien on it before seizure. The State ex rel. Davis v. Goodnow, 271.
- FIXTURES: TAXES: LIEN. The lien of the State for taxes on the realty cannot follow severed fixtures as personal property. Ib.

TEXAS CATTLE.

SEE JUDICIAL NOTICE.

VARIANCE.

- ENTRY NUNC PRO TUNC: WHEN MADE. Unless there is something of record by which to amend, an entry nunc pro tunc cannot be made. But where the files of the court, the motion, the entry of its filing, its purpose and the entry of similar orders at the same term, in the same cause, show that the order was made, a nunc pro tunc entry may be made. Hansbrough v. Fudge, 307; Briant v. Jackson, 318.
- PRACTICE: REPLY: FAILURE TO FILE. Where a cause has been tried
 on the theory that a reply has been filed putting in issue the new
 matter of the answer, the omission to file such reply cannot be taken
 advantage of on an appeal. Heath v. Goslin, 310.
- Indictment: Variance. Where the indictment charges the assault
 was made on Olive Hodson, and the evidence shows that it was Mrs.
 Hodson, Held, no variance material to the merits of the case, since
 the court below did not so find, and that finding is the test on this
 point. The State v. Smith, 516.

VENDOR'S LIEN,

SEE VENDOR AND VENDER.

VENDOR AND VENDEE.

1. VENDOR'S LIEN: WAIVER. The acceptance by the vendor of

other personal security than the note or obligation of the vendee, is only *prima facie* evidence of his intention to waive his vendor's lien, and may be rebutted by facts and circumstances which take from the act its *prima facie* import. Hunt v. Marsh, 396.

- 2. ——: FACTS WHICH REBUT PRESUMPTION OF WAIVER. Where it appeared that the vendor sold the land in the first instance to M, that the deed, at the latter's request, was made to his wife and son, that M paid part of the purchase money, that he delivered the note with his name on it for the balance; paid part of this note and entered into the possession of the land and still holds the possession thereof, Held, these facts divest the note of its independent and collateral character, and rebut the presumption of an intention on the part of the vendor by its acceptance, to waive the lien. Ib.
- COVENANT AGAINST INCUMBRANCES: WHEN RIGHT OF ACTION ACCRUES. No right of action accrues on a covenant against incumbrances in favor of the vendee of land, until he suffers an ouster or has been compelled to extinguish the incumbrances to save his estate. Ib.

VENUE.

- 4. Venue. Where the bill of exceptions purports to preserve all the evidence, and fails to show that the offense was committed in the county charged in the information, the judgment will be reversed. The State v. Apperger, 173; The State v. Britton, 60.
- 2. Justices' courts: Change of venue: Judgment. A judgment entered by a justice of the peace after a change of venue has been applied for, in due form, is erroneous, but cannot be treated as a nullity in a collateral proceeding. The State ex rel. Colvin v. Six, 61.

WHERE LAID. See The State v. Dennis, 589.

VERDICT.

- Petition: Assault and Battery: General verdict. One good count in a petition containing two counts for the same cause of action, will support a general verdict. McKee v. Calvert, 348.
- VERDICT: IMPEACHMENT OF. A verdict of a jury cannot be impeached, either by the affidavit of a juror, or by statements of the latter to third persons. The State v. Dunn, 681.

WILLS.

THE PROBATE OF A WILL is a judicial proceeding, and when made in another state a copy properly authenticated under the laws of the United States, is to be received in evidence in the courts of this State under section 1, article 4 of the Constitution of the United States. Keith v. Keith, 125.

WITNESSES.

- 6. WITNESS: EVIDENCE OF CONVICTION. When parol evidence is objected to, the record must be produced to prove the conviction of a witness. Another witness will not be allowed to testify that he saw the first in the penitentiary as a convict. This is true equally whether the testimony is offered to affect his competency or his credibility. The State v. Lewis, 11.
- A CASE where the defendant is not incompetent as a witness, neither
 of the original parties to the contract in controversy being dead.

 May v. Burk, 675.

RULES FOR THE GOVERNMENT

OF THE

SUPREME COURT OF MISSOURI,

Adopted at the April Term, 1877.

Chief Justice, his duty.

RULE 1. The Chief Justice shall superintend matters of order in the court room.

Motion to be written, signed and filed.

RULE 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

Argument of motions.

RULE 3. No motion shall be argued unless by the direction of the court.

Taking record from clerk's office.

Rule 4. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court.

Diminution of record, suggestion after joinder in error.

Rule 5. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

RULE 6. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four

hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Notices of writs of error.

RULE 7. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and be by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Reviewing Instructions.

RULE 8. In actions at law it shall not be necessary for the purpose of reviewing in the Supreme Court the action of any circuit court or any other court, having, by statute, jurisdiction of civil cases in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance be embodied in the bill of exceptions, but it shall be sufficient for the purpose of such review that the bill of exceptions state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instructions founded on it.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 9. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 10. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions, detailing all the evidence given and supposed to tend to the proof of such

fact or issue, and except to the opinion of the court that it does not so tend, which bill of exceptions shall be allowed by the court by which the cause is tried.

Exceptions to admission or exclusion of evidence.

RULE 11. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Bill of exceptions in equity cases.

RULE 12. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

Rule as to making out transcripts.

RULE 13. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not, (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause,) in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (e. g.) "summons issued October 2, 1871, executed October 5, 1871," and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

Presumptions in support of bills of exceptions.

RULE 14. The only purpose of a statement, in a bill or exceptions, that it sets out all the evidence in a cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall

be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Abstracts and briefs to be filed.

Rules 15 and 16 (as consolidated and amended at the April term, 1884). In all cases the appellant or plaintiff in error shall file with the clerk of this court on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of an abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for the respondent or defendant in error, at least thirty days before the day on which the cause is docketed for hearing; and the counsel for the respondent or defendant in error shall, at least ten days before the day the cause is docketed for hearing, deliver to the counsel for appellant or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall on or before the day next preceding the day on which said cause is docketed for hearing, file with the clerk of this court seven copies of the same, and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the clerk.

Citing authorities in briefs.

RULE 17. In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume

and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, section, paging and side paging shall be set forth.

Appellant's brief to allege errors complained of.

RULE 18. The brief filed on behalf of the appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to errors not thus specified, unless for good cause shown the court shall otherwise direct.

Fallure to comply with rules 15 and 16.

RULE 19. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with rules numbered 15 and 16, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of respondent or defendant in error, continue the cause at the costs of the party in default.

Agreed cases.

RULE 20. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligibly present to the Supreme Court, or any appellate court, the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed according to the opinion entertained by the Supreme Court respecting the same.

Motion for rehearing.

RULE 21. Motions for a rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or

with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel, but no motion for a rehearing shall be filed after the final adjournment of the court.

Motion for affirmance.

RULE 22. On motion for affirmance under section 49, article 13, chapter 110, Wagner's Statutes, the mere fact that the appellant has on file, or presents a copy of the transcript at the time such motion is made, shall not of itself be deemed "good cause" within the meaning of said section.

Former rules rescinded.

RULE 23. All rules not included in the foregoing enumeration are hereby rescinded.

ADDITIONAL RULES.

RULE 24. No writ of error from this court to the court of appeals can be issued by the clerk of this court in vacation. All applications in term time for writs of error to the court of appeals, shall be accompanied by an affidavit of the attorney of record that the cause in which such writ of error is sued out, is one of which this court has appellate jurisdiction under section 12, of article 6 of the constitution; and such affidavit shall state the facts conferring such jurisdiction, and thereupon the clerk shall issue such writ. (Adopted at the April term, 1878.)

RULE 25. That hereafter, in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause. (Adopted at the October term, 1878.)

RULE 26. A party, in any cause, filing a motion either

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to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given. (Adopted at the October term, 1879.)